STATE OF MICHIGAN

IN THE SUPREME COURT

KERRY JENDRUSINA,

Plaintiff-Appellee,

v

SHYAM MISHRA, M.D., and
SHYAM N. MISHRA, M.D., P.C.,
Jointly & Severally,

Defendants-Appellants.
_____/

SC No. _____
COA No. 325133
LC No. 13-3802-NH
(Macomb Circuit Court)

NOTICE OF FILING APPLICATION

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

PLUNKETT COONEY

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Attorney for Defendants-Appellants
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TO: Michigan Court of Appeals Clerk
Via TrueFiling Electronic Filing

Clerk of the Court
Macomb County Circuit Court

NOW COME Defendants-Appellants Shyam Mishra, M.D. and Shyam N. Mishra, M.D., P.C. and state that on November 7, 2016, their application for leave to appeal has been filed with the Michigan Supreme Court.

Respectfully submitted,

PLUNKETT COONEY

By: /s/ Karen E. Beach
KAREN E. BEACH (P75152)
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Dated: November 7, 2016

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STATEMENT OF APPELLATE JURISDICTION

Defendants-Appellants state that this Court has jurisdiction to consider and resolve the instant application pursuant to MCR 7.301(A)(2) (the Court has jurisdiction of a case after decision by the Court of Appeals) and 7.302(H) (the Court may grant or deny the application, enter a final decision, or issue a preemptory order). This Court's jurisdiction has been timely and properly invoked, as evidenced by the following:

- August 4, 2016 decision of the Court of Appeals (**Exhibit A**);
- Defendants' motion for reconsideration of the August 4, 2016 Opinion, timely filed on August 25, 2016 and denied on September 26, 2016; and
- November 7, 2016 application for leave to appeal, timely filed with this Court within the 42-day time period of MCR 7.302(C)(2)(c).

STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER PLAINTIFF'S CLAIM WAS PROPERLY DISMISSED UNDER MCR 2.116(C)(7) AND MCL 600.5838a(2) BECAUSE PLAINTIFF DISCOVERED OR SHOULD HAVE DISCOVERED HIS MALPRACTICE CLAIM BY JANUARY 3, 2011, WHEN HE WAS DIAGNOSED WITH END-STAGE RENAL DISEASE DESPITE ALLEGEDLY HAVING BEEN TOLD BY DEFENDANTS IN YEARS PRIOR THAT HIS KIDNEYS WERE FINE, AND PLAINTIFF FAILED TO FILE HIS CLAIM IN THE ENSUING SIX MONTHS?

Plaintiff-Appellant says "no."

Defendants-Appellees say "yes."

The trial court says "yes."

The Michigan Court of Appeals says "no."

II.

WHETHER THE TRIAL COURT PROPERLY DISREGARDED AS HEARSAY PLAINTIFF'S AFFIDAVIT PURPORTING TO ESTABLISH THAT PLAINTIFF DID NOT DISCOVER HIS MALPRACTICE CLAIM UNTIL SEPTEMBER 2012?

Plaintiff-Appellant says "no."

Defendants-Appellees say "yes."

The trial court says "yes."

The Michigan Court of Appeals says "no."

STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT

Defendants-Appellants request this Court review and reverse the Court of Appeals' August 4, 2016 Opinion (**Exhibit A**), through which that court reversed the trial court's grant of summary disposition to Defendants. The trial court granted summary disposition to Defendants based on the six-month discovery rule exception to the medical malpractice statute of limitations, MCL 600.5838a(2), finding that Plaintiff had failed to show that he did not and should not have discovered his claim against Defendants until six months before filing his complaint in March 2013. Rather, the trial court ruled that Plaintiff should have discovered his claim in January 2011, when he was diagnosed with end-stage renal failure and began dialysis, in spite of Defendants' previous assertions that Plaintiff's kidneys were "fine."

In a 2-1 decision, the Court of Appeals reversed the trial court's grant of summary disposition. A majority of the panel (Gleicher, P.J. and Shapiro, J.) found that the discovery rule exception applied on the facts of this case, and that the trial court had erred by granting summary disposition based on the statute of limitations. The dissent (Jansen, J.), disagreed and would have affirmed the trial court's grant of summary disposition for the reasons stated by the trial court (**Exhibit B**, Dissenting Opinion).

On application, Defendants request this Court adopt Judge Jansen's dissent and vacate the Majority Opinion, or grant leave to appeal and reinstate summary disposition in favor of Defendants.

STATEMENT OF FACTS

A. Introduction.

This case arises from a physician-patient relationship spanning over two decades between Plaintiff-Appellee Kerry Jendrusina ("Plaintiff") and Defendant-Appellant internist Shyam Mishra, M.D. ("Dr. Mishra") (together with Defendant-Appellant Shyam N. Mishra, M.D., P.C., "Defendants"). Plaintiff alleges that Dr. Mishra failed to diagnose his kidney disease in light of blood tests showing declining kidney function, and to refer Plaintiff to a nephrologist early enough for Plaintiff to avoid suffering end-stage renal disease, renal failure, and the need for dialysis. Plaintiff testified that he was aware that Dr. Mishra tested his "kidney number," i.e., creatinine, found it slightly elevated, and ordered a kidney ultrasound in 2009, which was interpreted as normal. Dr. Mishra then reassured Plaintiff that his kidneys were "fine." Plaintiff understood that as long as his "kidney number" remained below five, his kidneys were fine.

Two years later, in January 2011, Plaintiff was suddenly hospitalized and diagnosed with end-stage renal disease, and started dialysis. Plaintiff knew then that his kidneys were "shot," and was told by his doctors and nurses that he was "way past the point" where he should have been on dialysis. However, Plaintiff claims that he should not have discovered a possible cause of action against Dr. Mishra until 20 months later, when Plaintiff's treating nephrologist informed him that earlier referral to a nephrologist could have prevented the need for dialysis.

The trial court granted Defendants' motion for summary disposition based on the "discovery rule" exception to the medical malpractice statute of limitations in MCL

600.5838a(2), agreeing with Defendants that Plaintiff's claim was untimely filed by more than a year. The Court of Appeals reversed, issuing a published opinion which conflicts with this Court's prior precedent on the discovery rule, reverses the burden of proof imposed by the plain language of the statute, and threatens the viability of the statute of limitations defense in future medical malpractice cases. This Court should vacate the Majority Opinion or grant leave to appeal.

B. Dr. Mishra performs bloodwork and a kidney ultrasound to monitor Plaintiff's kidney function, telling Plaintiff in 2009 that his kidneys are "fine."

For over twenty years, Dr. Mishra treated and managed a number of Plaintiff's chronic conditions, including hypertension, high cholesterol, polycythemia, eosinophilia, edema, asthma, and sinus infections. In June 2007, Dr. Mishra diagnosed Plaintiff with renal insufficiency (**Exhibit C**, Complaint, ¶ 8). From that point forward, Dr. Mishra obtained regular bloodwork to monitor Plaintiff's kidney function.[1] Plaintiff alleges that from April 2007 through December 2010, despite lab results showing that his kidney function was declining, Dr. Mishra failed to refer Plaintiff to a nephrologist or counsel Plaintiff on the importance of avoiding certain medications, blood pressure monitoring, and dietary modifications (**Exhibit C**, ¶¶ 11-12).[2]

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[1] A chart summarizing those values appears at page 3 of **Exhibit C**.

[2] The factual and legal allegations in Plaintiff's complaint are accepted as true only for purposes of the statute of limitations analysis. Defendants deny all claims of malpractice and affirmatively state that Dr. Mishra complied with the standard of care in his treatment of Plaintiff in all respects. Plaintiff was always thoroughly advised as to the status of his kidney disease and was timely referred to a nephrologist for evaluation and further management of same.

Plaintiff testified in his deposition that, during that time period, he knew Dr. Mishra was performing annual blood tests which included a "kidney number," and that after each of these tests, Dr. Mishra informed Plaintiff that his "kidney number" was "okay" or "fine":

Q. So *throughout the years*, and I'm looking at actually your Complaint here, you had like your BUN [blood urea nitrogen] and creatinine tested by way of labs that Dr. Mishra ordered?

A. I didn't know about the BUN. He never told me about the BUN, if he did BUN.

Q. You knew about the creatinine?

A. He would go through the things, or the lady would go through the things, or the *doctor would go through the things with me and my wife and say*, your triglycerides, this, that, *and your kidney number*—I didn't know it was creatinine at the time—*was this, but as long as it's under five, you're fine, you're okay for now*. That's all I remember any kind of reference to kidney besides the ultrasound which he came back and said, "Your kidneys are fine."

Q. Fair enough, but you knew the creatinine number, they were looking at that to gauge your kidneys; correct?

A. I thought it was just another number he had looked at. I didn't know if it was related to the Simvastatin or what. I don't know why they were looking at the creatinine.

Q. I'm sorry. I thought you just told me that either he or the nurse said this is your kidney number?

A. *They said the kidney number*. I didn't know why they were looking at it. Your question was—I don't know why they were looking at it *but they said the number was okay*.

Q. In relation to your kidneys?

A. *They did say in relation to your kidneys it was fine*.

Q. And *they had been monitoring that* among other labs—

A. Yeah.

Q. --*for years*?

A. *Yeah, I trusted him. Whatever he said was good was good*.

* * *

A. ....I said I was with an internist. *The internist said everything was fine as long as the creatinine number was down a certain thing, you'd be fine*.

(**Exhibit D**, deposition, pp 58-59, 83) (emphasis supplied).

In December 2008, Plaintiff recalls that Dr. Mishra told him that his kidney values were "a little bit elevated," but that there was no cause for concern (Id. at 47-48). He denies that Dr. Mishra told him in 2007 that he was suffering from chronic kidney failure, although it is noted in his chart (Id. at 56). Plaintiff testified that he was experiencing swelling in his legs at that time (a sign of renal failure) (Id. at 46-48). Accordingly, Dr. Mishra ordered a kidney ultrasound to rule out renal failure in early 2009. Plaintiff understood that the kidney ultrasound performed in early 2009 was ordered after his "kidney number" came back slightly elevated, and that the test was done to check his kidney function after Plaintiff experienced swelling in his legs (Id. at 46-48). Dr. Mishra allegedly informed Plaintiff that his kidneys were "fine" following the ultrasound (Id. at 51-52).

After the 2009 kidney ultrasound, Plaintiff continued to treat with Dr. Mishra and to undergo regular testing for his kidney function. While Plaintiff denies that he ever received hard copies of his test results, he remembers Dr. Mishra telling him at some point that as long as his "kidney number" was below five, that his kidneys were fine (Id. at 58-60). Plaintiff confirmed that by "kidney number," he meant creatinine (Id. at 58, 83).

C. Plaintiff is diagnosed with end-stage renal failure in January 2011 and starts dialysis.

In January 2011, Plaintiff again experienced swelling in his legs. On January 3, 2011, Plaintiff presented to Henry Ford Macomb Hospital with what he thought was a severe case of the flu. Instead, he underwent another kidney ultrasound and a kidney biopsy, was diagnosed with acute renal failure and end-stage renal disease, and began hemodialysis during his hospital stay (**Exhibit C**, ¶¶ 13-14). Plaintiff confirmed that as of January 2011, he knew that he "was in full kidney failure, kidneys were shot, basically" (**Exhibit D**, p 66). Importantly, Plaintiff claims that the doctors and nurses caring for him in January 2011 told him that his lab values were "way past where [he] should be on dialysis" (Id. at 62-63).

After his diagnosis, Plaintiff began seeing two nephrologists, Dr. Provenzano and his partner, Dr. Jukaku Tayeb, and continued with dialysis to treat his end-stage renal disease. Shortly after his discharge from the hospital, Plaintiff met with Dr. Provenzano to review the results of the kidney biopsy.

In October 2011, Dr. Tayeb recommended Plaintiff obtain a kidney transplant (Id. at 66-67). Plaintiff had been researching kidney transplants on the internet (Id.). Plaintiff elected to continue with home dialysis instead and remains on dialysis at the present time.

D. Plaintiff sues Defendants in March 2013, and the trial court grants summary disposition based on the statute of limitations.

On March 18, 2013—over two years after his diagnosis—Plaintiff filed a notice of intent naming Defendants and alleging Defendants committed medical malpractice by failing to timely diagnose and treat his kidney disease. As Plaintiff's complaint did not allege any actions or inactions by Defendants occurring within the relevant limitations

period, Defendants promptly moved for summary disposition under MCR 2.116(C)(7), arguing that Plaintiff's claim was time-barred under MCL 600.5805(6). Plaintiff responded by submitting an affidavit claiming that he was not aware of his malpractice claim against Defendants until September 20, 2012, when Dr. Tayeb allegedly informed him that an earlier referral to a nephrologist would have delayed or eliminated his need for dialysis and a kidney transplant (**Exhibit E**). Using that date, Plaintiff argued his claim was timely filed under the six-month "discovery rule" found in MCL 600.5838a(2). Defendants replied that under Michigan's objective standard for the discovery of malpractice claims, Plaintiff should have been aware of a possible claim regarding the propriety of Dr. Mishra's care no later than January 2011 (when he was diagnosed with end-stage renal disease and began dialysis) or October 2011 (when Dr. Tayeb recommended a kidney transplant). The Honorable James M. Biernat, Jr. of the Macomb County Circuit Court denied Defendants' motion without prejudice to allow the parties to complete discovery (**Exhibit F**, December 23, 2013 order denying Defendants' motion for summary disposition).

Following the close of discovery, including the taking of Plaintiff's deposition, Defendants re-filed their motion for summary disposition under MCR 2.116(C)(7). Plaintiff again relied on his affidavit as establishing that he did not discover his possible claim against Defendants until his September 20, 2012 conversation with Dr. Tayeb, and that his claim was timely filed under the six-month discovery rule. Judge Biernat heard oral argument on September 29, 2014 and took the motion under advisement (**Exhibit G**).

On October 23, 2014, Judge Biernat issued an Opinion and Order granting summary disposition to Defendants under MCR 2.116(C)(7) (**Exhibit H**). Judge Biernat found that

the latest date on which Plaintiff discovered or should have discovered his malpractice claim was January 3, 2011, when he was hospitalized, diagnosed with end-stage renal disease, and began dialysis (Id. at 3-4). Under Michigan's objective standard for discovery of possible malpractice claims, at this time Plaintiff "should have been aware that such diagnosis was contradictory to defendants' diagnosis," i.e., that there was "nothing to worry about in terms of his kidneys" (Id. at 4). Using this date, Plaintiff should have filed his claim on or before July 3, 2011 but failed to do so. Judge Biernat found that Plaintiff's claim had accrued before Plaintiff and Dr. Tayeb discussed a kidney transplant in October 2011 because the transplant discussion did not constitute a diagnosis of Plaintiff's kidney disease, which was previously made in January 2011 (Id. at 5). Judge Biernat also rejected Plaintiff's argument that his claim was timely filed under a continuing-wrong or continuing-treatment doctrine (Id. at 4). Judge Biernat acknowledged but rejected Plaintiff's affidavit as sufficient to establish September 20, 2012 as the date of discovery because the affidavit was based on inadmissible hearsay under MRE 801 and 802 (Id.).

Plaintiff timely filed a motion for reconsideration of the trial court's ruling, which was denied on November 26, 2014 (**Exhibit I**). Plaintiff's timely appeal followed. At no point during the trial court or Court of Appeals proceedings did Plaintiff ever assert that he should not have discovered his possible claim against Dr. Mishra because he thought his renal failure was an acute event, rather than the end stage of progressive chronic kidney disease. Instead, Plaintiff relied on his affidavit stating that he was not aware, until Dr. Tayeb made him aware, that his kidney failure and the need for dialysis could have been avoided if Dr. Mishra had treated him properly.

E. The Court of Appeals reverses in a published decision, finding Plaintiff should not have discovered a possible cause of action until he learned his kidney failure was progressive rather than acute.

On August 4, 2016, Judges Gleicher and Shapiro issued their published Majority Opinion reversing the grant of summary disposition (**Exhibit A**). The Court of Appeals Majority held that the trial court had erred by finding Plaintiff's claim was untimely under the discovery rule of § 5838a(2), and that the trial court's ruling "effectively substituted the phrase '*could have*' for *'should have*' in the statute" (**Exhibit A**, p 1) (emphasis original). The Majority found that Plaintiff did not and should not have discovered his failure-to-diagnose claim against Defendants on January 3, 2011, because, at that time, he did not know whether his recently-diagnosed renal failure was the result of an acute incident or a progressive condition (Id. at 5). Conducting its own research into the nature and pathophysiology of kidney disease, and employing arguments not made by the parties below, the Majority concluded that because it is possible for kidney failure to develop suddenly *or* slowly over time, Plaintiff should not have discovered his claim against Defendants until his conversation with Dr. Tayeb in September 2012, at which time he was told that an earlier diagnosis and referral to a nephrologist could have saved his kidneys and prevented dialysis (Id. at 5-6, fn 7). Although Plaintiff could have discovered his claim before that date if Plaintiff had investigated the potential causes of kidney failure and obtained his own medical records showing his climbing creatinine values and the 2007 diagnosis of chronic renal insufficiency, the Majority deemed that such a burden was not required of an ill plaintiff (Id. at 6-7). Instead, the Majority found dispositive *Defendants'* alleged failure to show "that a reasonable lay person understands the anatomy, physiology,

or pathophysiology of kidneys," (Id. at 5) notwithstanding that § 5838a(2) assigns the burden of proof on the discovery rule's applicability to Plaintiff. The Majority concluded by ruling that the trial court erred by finding Plaintiff's affidavit regarding his alleged conversation with Dr. Tayeb inadmissible as hearsay (Id. at 7-8, fn 11).

Judge Jansen wrote a Dissenting Opinion (**Exhibit B**) which agreed with the discovery rule analysis proffered by Defendants and admonished the Majority for conducting its own medical research into the causes and progression of kidney disease, relying on facts and arguments outside of the record (Id. at 3). The Dissenting Opinion observed that this Court's discovery rule jurisprudence imposed a duty of reasonable diligence on a potential malpractice plaintiff, and found that Plaintiff's knowledge that his "kidney number" had been tested, and Dr. Mishra had informed him that his kidneys were "fine" following a kidney ultrasound, should have caused Plaintiff to discover a possible claim against Dr. Mishra when he learned in January 2011 that his kidneys were failing (Id. at 3-4). The Dissenting Opinion found that Dr. Mishra had informed Plaintiff regarding the status of his kidneys in terms which Plaintiff could understand, and that Plaintiff understood Dr. Mishra was monitoring his kidneys (Id. at 4).

Defendants filed a timely motion for reconsideration, which was denied in an order dated September 26, 2016 (**Exhibit J**). Defendants' application for leave to appeal followed.

THIS APPLICATION SATISFIES THE CRITERIA FOR SUPREME COURT REVIEW

This application from a published opinion of the Court of Appeals satisfies several of the MCR 7.305(B) criteria for Supreme Court review. Under MCR 7.305(B)(3), the Majority Opinion presents a binding interpretation of the six-month "discovery rule" in medical malpractice cases, a legal issue of major significance to the state's jurisprudence in medical malpractice cases and other areas of law involving similar discovery rule exceptions to the statute of limitations. The Majority Opinion weakens the viability of the statute of limitations defense as a tool for encouraging the diligence of potential plaintiffs and protecting potential defendants from stale and fraudulent claims, particularly in claims involving primary care physicians performing the "routine" tests performed by Dr. Mishra here. The Majority Opinion uses medical evidence outside of the record to create and find dispositive arguments not made by the parties; specifically, that Plaintiff should not have discovered a possible claim against Defendants unless and until he understood that his kidney failure was the result of a progressive disease process, and not an acute event. In so doing, the Majority improperly places the burden on medical defendants to establish and/or challenge the plaintiff's understanding of his or her own disease process, when this information is exclusively within the plaintiff's knowledge, and is part and parcel of the burden explicitly assigned by the Legislature to the plaintiff to show that the requirements of the discovery rule are met. The Majority Opinion is thus in conflict with both the letter and intent of § 5838a(2). The purported basis for the Majority Opinion—that the trial court decision conflicts with the plain language of § 5838a(2) because it allegedly employs a "could have discovered" standard—is simply a strawman designed to give false

legitimacy to binding precedent which subverts the purpose of § 5838a(2). It is the Majority, and not the trial court, which has issued an opinion contrary to § 5838a(2)—and the Majority's opinion is binding upon trial courts and the Court of Appeals.

Under MCR 7.305(B)(5)(b), the Majority Opinion conflicts with this Court's decision in *Solowy v Oakwood Hosp Corp*, 454 Mich 214; 561 NW2d 843 (1997), because it attempts to replace the "possible cause of action" standard adopted in *Solowy* with the "likely cause of action" standard rejected in that case. The Majority Opinion also ignores the requirement, stated in several Supreme Court and Court of Appeals decisions, that a plaintiff invoking the discovery rule must exercise "reasonable diligence" to discovery his or her claim. The Majority Opinion makes no mention of this requirement, while positing that Plaintiff should not have discovered his claim without basic information which is available via a simple internet search. In other words, the Majority Opinion suggests to other courts and litigants that the "reasonable diligence" requirement for a plaintiff invoking the discovery rule in 2016 does not include a simple internet search. The Majority Opinion also conflicts with Court of Appeals decisions applying the *Solowy* standard to cases involving progressive disease processes and the alleged failure to communicate test results, including a decision involving Judge Gleicher (a member of the Majority here).

Under MCR 7.305(B)(5)(a), the Majority Opinion is clearly erroneous and will cause material injustice. The Majority went outside of the record to create, and then find dispositive, an argument which was never advanced by Plaintiff below, on an issue on which Plaintiff has the burden of proof. Both parties in this case have been ably represented by counsel throughout this litigation, and it is materially unjust for the

Majority to excuse Plaintiff's apparent failure to meet his burden of proof with the arguments actually articulated by counsel, and then meet that burden of proof on his behalf. Moreover, the facts and reasoning used to support the Majority Opinion are seriously flawed, and do not provide a proper basis on which to build Michigan's discovery rule jurisprudence as part of a published opinion. The adversarial process is designed to prevent such errors, and the Majority Opinion should not be permitted to stand as encouragement to other courts to employ the same flawed methods. For all of these reasons, and the reasons further articulated in this application, this Court should vacate the Majority Opinion or grant leave to appeal.

ARGUMENT I

PLAINTIFF'S CLAIM WAS PROPERLY DISMISSED UNDER MCR 2.116(C)(7) AND MCL 600.5838a(2) BECAUSE PLAINTIFF DISCOVERED OR SHOULD HAVE DISCOVERED HIS MALPRACTICE CLAIM BY JANUARY 3, 2011, WHEN HE WAS DIAGNOSED WITH END-STAGE RENAL DISEASE DESPITE ALLEGEDLY HAVING BEEN TOLD BY DEFENDANTS IN YEARS PRIOR THAT HIS KIDNEYS WERE "FINE," AND PLAINTIFF FAILED TO FILE HIS CLAIM IN THE ENSUING SIX MONTHS.

A. Introduction.

The Majority Opinion is seriously and fundamentally flawed, both in its treatment of the facts and arguments made (and not made) in this case, and in its binding treatment of the discovery rule. The Majority Opinion undoes the decision by this Court in *Solowy* to adopt the "possible cause of action" standard, replacing it with the "likely cause of action" standard rejected in *Solowy*. Under the "possible cause of action" standard, Plaintiff here knew or should have known of several potential connections between his January 2011 diagnosis of kidney failure and Dr. Mishra's course of treatment; the fact that a non-negligent explanation existed for the diagnosis as well does not, under *Solowy*, negate the discovery of a possible cause of action against Dr. Mishra. The Majority Opinion ignores entirely the burden imposed by § 5838a(2) on Plaintiff to show that he should not have earlier discovered a possible cause of action, and the burden of reasonable diligence imposed by previous Supreme Court and Court of Appeals decisions on Plaintiff to discover a possible cause of action. These two burdens go hand-in-hand, as it is Plaintiff's responsibility to raise, if relevant to the discovery rule analysis, his own alleged lack of understanding of how kidney disease works. Plaintiff did not do this below, and the Majority instead raises this issue *sua sponte*, going outside of the record and making

speculative arguments to satisfy Plaintiff's burden of proof for him. This approach, enshrined in a published opinion, violates the adversarial process and turns an error-correcting court into an advocate.

While the Majority professes allegiance to the plain language of § 5838a(2), the Majority Opinion violates the statute's assignment of the burden of proof to Plaintiff, and also violates the statute's purpose as a statute of limitations: to encourage diligence by plaintiffs, and protect defendants from stale and fraudulent claims. This Court's intervention is needed to ensure the continued viability of the medical malpractice statute of limitations, and the correct interpretation of the discovery rule exception thereto.

B. Standard of review.

MCR 2.116(C)(7) allows for summary disposition where a claim is barred by the statute of limitations. This Court reviews *de novo* a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). This Court also reviews *de novo* questions of statutory interpretation. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008). Whether a plaintiff's action is statutorily barred is a question of law for the court to decide. *Moll v Abbott Laboratories*, 444 Mich 1, 28; 506 NW2d 816 (1993). In considering such a motion, a court must accept the plaintiff's well-pled allegations as true. *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 252; 506 NW2d 562 (1993).

C. It is Plaintiff's burden to show satisfaction of the discovery rule, a narrow exception to the favored statute of limitations defense.

The standard period of limitation for a malpractice action is two years. MCL 600.5805(6). Plaintiff does not dispute that his claim would be time-barred under §

5805(6), but rather argues that Michigan's six-month "discovery rule" set forth in MCL 600.5838a(2) applies as an alternative means for commencing the running of the statutory period. The statute states as follows:

> (2) Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. However, except as otherwise provided in section 5851(7) or (8), the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim. *The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff*. A medical malpractice action that is not commenced within the time prescribed by this subsection is barred.

(emphasis supplied).

To understand the proper place of the six-month "discovery rule" exception to the statute of limitations in medical malpractice actions, it is first necessary to understand the purpose and value of the statute of limitations. Nearly 100 years ago, this Court adopted the United States Supreme Court's view that "[s]tatutes of limitations are vital to the welfare of society and are favored in the law." *Ramsey v Child, Hulswit & Co*, 198 Mich 658, 671; 165 NW 936 (1917) (quoting *Wood v Carpenter*, 101 US 135, 139 (1879)). This Court describes the "primary purposes behind statutes of limitations [as]: (1) to encourage plaintiffs to pursue claims diligently, and (2) to protect defendants from having to defend against stale and fraudulent claims." *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 311; 399 NW2d 1 (1986). Thus, any application of the statute of limitations or an exception

thereto must be done with consideration of what it means for a plaintiff to "diligently" pursue the factual and legal aspects of his or her claim.

Exceptions to statutes of limitation are to be construed strictly. *Michigan Millers Mutual Ins Co v West Detroit Building Co, Inc*, 196 Mich App 367, 374; 494 NW2d 1 (1992). The purpose of a "discovery rule" exception to a statute of limitations, such as the six-month discovery rule applicable to medical malpractice claims, is to prevent "unjust results" when "a plaintiff would be otherwise denied a reasonable opportunity to bring suit because of the *latent nature* of the injury or the *inability to discover* the causal connection between the injury and the defendant's breach of duty owed to the plaintiff." *Lemmerman v Fealk*, 449 Mich 56, 65-66; 534 NW2d 695 (1995) (emphasis supplied). Where the discovery rule is found appropriate, a plaintiff is deemed to have discovered a cause of action when the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, an injury and its possible cause. *Gebhardt v O'Rourke*, 444 Mich 535, 545; 510 NW2d 900 (1994). Even under the discovery rule, a claimant must take diligent steps to discover a cause of action and cannot simply wait for others to inform him or her of the existence of a cause of action. *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995).

The plaintiff has the burden of invoking and establishing the applicability of the discovery rule, by "proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim" more than six months before the action was commenced. § 5838a(2).

D. Plaintiff cannot overcome the objective "possible cause of action" standard set forth by this Court in *Solowy*.

This Court's leading case on the discovery rule in medical malpractice cases is *Solowy v Oakwood Hosp Corp*, 454 Mich 214; 561 NW2d 843 (1997). In *Solowy*, the Court conclusively confirmed that Michigan has an objective standard for the discovery of possible malpractice claims under the six-month discovery rule. Under this standard, "the plaintiff need not know for certain that he had a claim, or even know of a likely claim before the six-month period would begin. Rather, the discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action." 454 Mich at 222. Specifically, the standard does not require the plaintiff to know that the injury "was in fact or even likely caused by the defendant doctors' alleged omissions," nor does the standard require that the plaintiff is aware of the "full extent of [the] injury before the clock begins to run." *Id*. at 224. This "possible cause of action" standard requires only "some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act." *Id.* at 226.

In *Solowy*, the plaintiff had had a cancerous lesion removed from her left ear by the defendant dermatologists, who assured her during the course of her treatment that the cancer was "gone" and that there was no chance of it recurring. 454 Mich at 216-217. The plaintiff claimed that the defendants failed to advise her that she should return for further follow-up or treatment, or that the cancer could potentially recur. *Id.* Five years after her final appointment with the defendants, the plaintiff discovered a similar lesion at approximately the same site as the removed cancer, and consulted a different dermatologist, who initially advised her that there were two possible diagnoses for the

lesion: either the cancer had returned, or it was a noncancerous lesion. *Id.* at 217. A biopsy of the lesion revealed that it was indeed cancerous, and its advanced stage meant that a surgeon had to remove the entire top portion of the plaintiff's left ear to remove all of the cancerous cells. *Id*. The plaintiff sued the defendant dermatologists, claiming that their misrepresentations that the cancer would not recur caused her to delay seeking treatment, resulting in a more radical and disfiguring surgery than would have been required if she had sought treatment earlier. The plaintiff claimed her suit was timely filed under the six-month discovery rule because it was filed within six months after the date her treating dermatologist confirmed the second lesion was indeed cancerous.

The defendants moved for summary disposition under MCR 2.116(C)(7), arguing that the plaintiff should have discovered her claim on the date of her first visit with the treating dermatologist, when she was informed that the lesion was possibly a recurrence of cancer. The Court, defining and applying the objective standard for Michigan's discovery rule, granted summary disposition to the defendants, finding that once the plaintiff was aware that the lesion could be a recurrence of cancer, the "possible cause of action" standard was met. *Id.* at 225. This is because the plaintiff was also aware, as of that date, that her injury was possibly caused by her former dermatologists' failure to inform her that the cancer could recur and that she should seek follow-up treatment. *Id.* at 224. The Court emphasized that Michigan's "possible cause of action standard does not require that the plaintiff know that the injury to her ear, in the form of the advancement of the disease process, was in fact or even likely caused by the defendant doctors' alleged omissions," or

that the plaintiff know that the progression of cancer would eventually require removal of a far larger portion of her ear than if she had sought treatment earlier. *Id*. at 224-225.

Here, like the plaintiff in *Solowy*, Plaintiff alleges that he was negligently informed by Dr. Mishra that his kidney function was "fine," and that there was no cause for concern about his kidneys or need to see a nephrologist for follow-up treatment after his "normal" kidney ultrasound in early 2009. This understanding of his condition was definitively changed only two years later in January 2011, when Plaintiff again had a kidney ultrasound performed, was diagnosed with end-stage renal disease, and informed that his "kidney number" was "way past" the point where he should have been on dialysis. The trial court's written opinion reflects that it correctly applied Michigan's six-month discovery rule to the objective facts of this case to find Plaintiff's claim was untimely filed:

> The Court opines that plaintiff should have discovered his claim by January 3, 2011, when he started hemodialysis, at which time there was no question that he was diagnosed with end-stage renal disease. As of that time, plaintiff should have been aware that such diagnosis was contradictory to defendants' diagnosis. As addressed above, plaintiff testified that defendants had informed him there was nothing to worry about in terms of his kidneys. *Solowy*, *supra*; *McGuire*, *supra*. Thus, plaintiff had 6 months from such date within which to file his claim, or, more specifically, he should have filed his claim by July 3, 2012 at the latest. Since he failed to do so, his claim is time-barred.

(**Exhibit F**, p 4).

The Majority distinguishes *Solowy* from the instant case by pointing to the differences between the plaintiffs' disease processes and medical histories. In *Solowy*, the Majority observes, the plaintiff faced the visible recurrence of the exact same skin cancer, in the exact same place, with the exact same appearance, which had previously been identified and excised from her ear. Here, Plaintiff faced a progressive internal disease

process (chronic kidney failure), the warning signs of which (worsening lab values and symptoms such as edema) were allegedly ignored or misinterpreted by Dr. Mishra and allegedly kept secret from Plaintiff, until the end-stage outcome of the disease (renal failure) was irreversible and manifest. But the Majority's conclusion that the two cases have different outcomes under the discovery rule is incorrect both factually and legally.

Like the plaintiff in *Solowy*, Plaintiff was made aware that his treating physician's alleged representations of his kidney function as "nothing to worry about" were inaccurate and that his kidneys were indeed severely damaged—to use Plaintiff's words, "basically shot." In fact, Plaintiff was even more aware of the possible connection between his injury and Dr. Mishra's alleged failure to properly treat him than the plaintiff in *Solowy* because Plaintiff was *unequivocally* informed in January 2011 that his kidneys were failing (i.e., not "fine"), that dialysis was necessary, and that (according to the St. John doctors and nurses) he should have been on dialysis a long time ago. In *Solowy*, there was at least a question initially whether the plaintiff's lesion was indeed cancerous or benign, such that she could not be absolutely sure that an injury had occurred until she obtained a definitive diagnosis. The Court rejected this argument, finding that after the initial visit raising the possibility of cancer, "the plaintiff, while lacking specific proofs, was armed with the requisite knowledge to diligently pursue her claim." *Id.* at 225.

Applying the *Solowy* standard to the objective facts in this case, a reasonable person should have discovered, in January 2011, that Dr. Mishra had possibly committed malpractice with respect to Plaintiff's kidneys. The Majority's assertion that Plaintiff needed his lab reports showing his rising creatinine and eGFR values to know that his

kidney failure was a "slowly progressing condition rather than an acute event" is incorrect for two reasons (**Exhibit A**, p 5).[3] First, Plaintiff's understanding of his kidney function as of 2009 was that his kidneys were "fine" so long as his "kidney number" was below a certain level (5, to be precise). He was told by his doctors in January 2011 that his "number" was "way past" the point where he should have been receiving treatment for his kidneys, i.e., dialysis. This worsening of his kidney function, as evidenced by the objective increase in Plaintiff's "kidney number" from "fine" to "way past" the need for dialysis, necessarily took place between 2009 and 2011, during which time Plaintiff knew Dr. Mishra was testing his "kidney number" (or, at the very least, Plaintiff knew he had a "kidney number" by which his kidney function could be monitored). Under *Solowy*, the discovery rule applies to the discovery of the injury (here, end-stage renal disease), not to the discovery of the consequences of the injury which are subsequently realized (here, the need for dialysis and a kidney transplant).[4] *Id.* at 223-224.

Second, even a layperson such as Plaintiff should know that a diagnosis of <u>*end-stage*</u> disease necessarily means that there were other, earlier stages of the disease (impliedly less severe and/or more reversible) which the patient necessarily suffered from prior to reaching the "end-stage" of the disease. These objective facts alone indicate that Plaintiff

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[3] As explained in section G, *infra*, the Majority's "acute or progressive" analysis renders the entire opinion faulty because it relies on facts outside of the record and arguments not litigated by the parties below.

[4] However, in this case, these consequences were themselves undisputedly discovered by Plaintiff by the end of 2011, more than six months before Plaintiff filed his NOI in March 2013. Thus, Plaintiff was aware of the nature, extent, and possible cause of his injury well before he was allegedly informed by Dr. Tayeb in September 2012 that earlier referral to a nephrologist may have delayed or prevented the need for dialysis.

suffered from a progressive kidney disease which had advanced into its end-stage by January 2011, directly contrary to Dr. Mishra's assertions in 2009 and thereafter that Plaintiff's kidneys were "fine." Thus, as of January 2011, Plaintiff was "armed with the requisite knowledge to diligently pursue his claim" against Dr. Mishra. *Solowy*, 454 Mich at 225; see **Exhibit B**, pp 3-4.

Even without knowledge of his lab values, Plaintiff should have discovered "a possible cause of action" against Dr. Mishra in January 2011, following his diagnosis of end-stage renal disease. *Solowy*, 454 Mich at 223. Plaintiff knew, after a kidney ultrasound in the hospital, that his kidneys were suddenly "shot" only two years after having the same test performed and being told by Dr. Mishra that his kidneys were "fine." On the basis of these objective facts, there were several possible nexuses between Dr. Mishra's alleged acts or omissions and Plaintiff's irreversible kidney failure:

- It was possible that Dr. Mishra had negligently misread the 2009 ultrasound, and had failed to diagnose early-stage renal disease.
- It was possible that Dr. Mishra had misread his "kidney number" when it was tested between 2009 and 2011, and had not noticed the rising levels until Plaintiff was "way past" the point where he should have been on dialysis.
- It was possible that Dr. Mishra had mismanaged Plaintiff's other conditions and medications, causing Plaintiff to develop kidney disease.
- It was possible Dr. Mishra had failed to continue to test Plaintiff's "kidney number" between 2009 and 2011
- And, as Plaintiff ultimately alleged, it was possible that Dr. Mishra had noticed Plaintiff's rising "kidney numbers" but failed to timely refer Plaintiff to a nephrologist.

All of these were "possible causes of action" which a layperson, armed with the objective facts and medical history known to Plaintiff in January 2011, should have

discovered and diligently pursued at that time. "Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Solowy*, 454 Mich at 223. The Majority's reliance on the possibility that Plaintiff's kidney failure in January 2011 could have been caused by an acute condition (which would not implicate Dr. Mishra as negligent) does not render the above causes of action any less possible, based on the objective facts then known to Plaintiff. The possible cause of action standard does not require the plaintiff to know that the injury "was in fact or even likely caused by the defendant doctors' alleged omissions;" only that Plaintiff possess "some minimum level of information that, when viewed in its totality, suggests a nexus between the injury and the negligent act." *Id.* at 226.

Plaintiff's acquisition of his medical records from Dr. Mishra to determine Plaintiff's actual cause of action, if any, is but one part of the "exercise of reasonable diligence" required of a medical malpractice claimant in pursuing a possible cause of action. It is not a condition precedent to starting the clock on the six-month discovery period when, as here, the objective facts known prior acquiring the records point to a possible cause of action against the defendant doctor.

E. The Majority Opinion here deviates from previous Court of Appeals cases applying the *Solowy* standard to the progression of a chronic condition.

The instant case is not the first in which the Court of Appeals has been tasked with applying *Solowy*'s discovery rule standard to claims asserted against physicians who allegedly fail to inform patients of the progression of a chronic condition. While the panel in this case was not bound by the unpublished opinions described below, the Majority failed to even acknowledge the different outcomes reached in these cases, let alone explain

why they should be distinguished based on either an incorrect application of the *Solowy* standard or a disparate set of facts. This supports Defendants' suspicion that the published Majority Opinion was issued to forge a more plaintiff-friendly path under a new discovery rule standard, rather than to correct a misapplication of the governing *Solowy* standard.

This case is virtually indistinguishable from a previous case decided by Judge Gleicher involving the alleged failure to communicate test results, causing a treatable condition to progress to an untreatable state. In *Paluda v Associates of Internal Medicine, PC*, Docket No. 303789, *rel'd* June 21, 2012; 2012 WL 2362405 (unpublished) (**Exhibit K**), the defendant doctor performed a Prostate Specific Antigen (PSA) test on the plaintiff. The results showed that the plaintiff had a mildly elevated PSA, which might indicate that he had prostate cancer. According to the plaintiff, the doctor did not inform him about the results and did not schedule any follow-up tests. The plaintiff continued to see the doctor for the next three years, during which time the doctor did not take any action concerning the elevated test result and did not conduct further PSA testing. When plaintiff reported complaints of difficulty urinating, the doctor tested his PSA again and found that the level was now ten times greater than normal. The plaintiff was diagnosed with advanced prostate cancer soon thereafter, and subsequently died. The Court of Appeals panel, including Judge Gleicher, applied the discovery rule and concluded that the plaintiff should have discovered his possible cause of action when he was diagnosed with an advanced form of prostate cancer. "Given the advanced stage and [plaintiff]'s knowledge concerning his prior treatments, he knew or should have realized that he had had prostate cancer for some time and, as such, he knew or should have known that [the doctor] might have

negligently failed to properly detect or diagnose his condition at an earlier stage….Using reasonable diligence, [plaintiff] could have discovered that the failure to detect [plaintiff's] prostate cancer at an earlier stage was, at least in part, due to [the doctor]'s negligence." *Id.* at *3.

At oral argument in this case, Judge Gleicher commented that she felt the panel was constrained and bound by the Court's opinion in *Solowy*. If the Majority had actually applied the discovery rule in *Solowy* faithfully to the facts of this case, this case would have been resolved in the same way as in *Paluda*, *supra*, where the diagnosis of an advanced disease process, coupled with knowledge of prior assessment of the body part affected by the disease process a mere three years earlier, meant that the plaintiff knew or should have known that his treating physician during the interim period might have negligently failed to properly detect or diagnose his progressive condition at an earlier stage, *even absent ongoing testing*. Here, the objective facts are even more suggestive of a possible cause of action, as Plaintiff knew his "kidney number" was slightly elevated in 2008, as opposed to the plaintiff in *Paluda*, who was never told of his first elevated PSA. The operative difference between this case and *Paluda* is the Majority's application of a new discovery rule, one which allows a plaintiff diagnosed with an advanced terminal disease to ignore the existence of a possible malpractice claim against the physician who treated him throughout the earlier stages of the disease, unless and until he obtains the medical records providing conclusive proof of the doctor's failure to earlier diagnose the condition. The Majority opinion in this case is an improper usurpation of this Court's prerogative to

interpret the scope of the discovery rule, done here with precedential effect by an error-correcting court through a published opinion.

In *Zimnicki v Rollins*, Court of Appeals Docket No. 217900, *rel'd* Dec. 26, 2000; 2000 WL 33388547 (unpublished) (**Exhibit L**), the Court of Appeals held that the six-month discovery rule barred a plaintiff's claims of medical malpractice against a physician who allegedly failed to inform the plaintiff of the nature and progression of his inner ear condition. The panel found that, although the defendant "should have better informed plaintiff of the nature and progression of his disease," the plaintiff should have known of a possible cause of action at multiple times throughout his subsequent treatment for the disease, including: (1) when he was referred by another doctor to an ENT; (2) when he met with that ENT to discuss his condition and what has happened, and was referred to an even more specialized ENT surgeon; (3) when the ENT surgeon "immediately" diagnosed him with cholesteatoma and recommended further testing and a one or two-stage surgery; and, giving plaintiff the benefit of the doubt, (4) when a third surgery was performed, given plaintiff's assertion that he believed two surgeries constituted "normal" treatment for his disease. In applying the *Solowy* standard to the facts in *Zimnicki*, the panel did not examine when the plaintiff acquired the records and evidence necessary to establish that Dr. Rollins had failed to timely diagnose his ear condition and refer him to an ENT.

In *Horton v St John Health System-Detroit-Macomb Campus*, Court of Appeals Docket No. 222952, *rel'd* Nov. 6, 2001; 2001 WL 1388352 (unpublished) (**Exhibit M**), the Court of Appeals rejected a plaintiff's argument that the decedent could not have discovered her claim until she was informed that her breast cancer, which the defendant doctor had failed

to diagnose, progressed to a terminal stage. The panel found that under the possible cause of action standard, "the decedent should have discovered that the progression of her cancer to an advanced stage was possibly caused by defendant's alleged failure to timely diagnose her condition," and that the decedent's death was a consequence of the progression of her cancer to an advanced stage, which did not give rise to a new cause of action. *Id*. at *2. Thus, the decedent did not need to know her cancer had progressed to the point of becoming terminal to know that she had possibly been injured by the defendant's failure to timely diagnose her with breast cancer years earlier, when she presented with right breast pain. Likewise, Plaintiff's deterioration of kidney function due to Dr. Mishra's alleged failure to timely diagnose kidney failure and to refer Plaintiff to a nephrologist is only the consequence of the progression of Plaintiff's condition—of which he was aware as of January 2011—to an advanced stage.

F. The Majority's new discovery rule standard is an attempt to adopt the "likely cause of action" standard rejected by this Court in *Solowy*, and an attempt to reverse the statutory burden of proof.

On page 5 of the Majority Opinion, the Majority sets forth its understanding of the objective standard to be applied to the discovery rule, and identifies the alleged basis for finding that standard unmet in this case:

> An objective standard, however, turns on what a reasonable, ordinary person would know, not what a reasonable physician (or medical malpractice attorney) would know. Thus, the question is whether a reasonable *person*, not a reasonable *physician* would or should have understood that the onset of kidney failure meant that the person's general practitioner had likely committed medical malpractice by not diagnosing kidney disease.
>
> Indeed, defendant does not contend that a reasonable lay person understands the anatomy, physiology, or pathophysiology of kidneys. One would be hard pressed to find a reasonable, ordinary person, who is not a

> medical professional, who knows what creatinine is or what an abnormal creatinine level means, in addition to knowing how kidneys fail, why they fail, and how quickly they can fail.

(emphasis original).

The first problem with the Majority's articulation of the discovery rule is that it adopts the "likely cause of action" standard rejected by this Court in *Solowy* in favor of the "possible cause of action" standard. Michigan's "possible cause of action standard does not require that the plaintiff know that the injury…was in fact or even likely caused by the defendant doctors' alleged omissions." *Solowy*, 454 Mich at 224-225. The Majority's inquiry of whether "a person's general practitioner *had likely committed medical malpractice*" is necessarily an inquiry into whether the person's injury was likely caused by medical malpractice, and whether a cause of action was likely, not merely possible, based on the objective facts. As set forth above, a reasonable person in Plaintiff's position in January 2011 should have known of a possible cause of action against Dr. Mishra related to Plaintiff's kidney failure, even if the precise nature of the actual claim (failure to diagnose chronic kidney disease) or the necessary evidence to sustain a claim was not yet known. See *Shawl v Dhital*, 209 Mich App 321, 326; 529 NW2d 661 (1995) (rejecting, under possible cause of action standard, plaintiff's argument that complex nature of claims prevented him from discovering a possible claim until after doctors' depositions). The Majority Opinion conflicts with this Court's precedent regarding whether Michigan's discovery rule uses a "possible" or a "likely" cause of action standard.

The second major problem with the Majority Opinion's articulation of the discovery rule is that it thrusts the burden upon the defendant to show that a reasonable person in

the plaintiff's position would have known or understood the nature of his disease process well enough to discover his claim at the time asserted by the defendant. This completely reverses the burden imposed by § 5838a(2):

> The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim *is on the plaintiff*.

(emphasis supplied). In providing this narrow exception to the favored statute of limitations defense, the Legislature clearly and unequivocally placed the burden upon the plaintiff seeking to take advantage of the exception to show that he did not discover nor should have discovered his claim any earlier than the date identified by the plaintiff. This ultimate burden of proof is not changed by the summary disposition standard requiring all evidence to be viewed in the light most favorable to the non-moving party—in discovery rule cases, the plaintiff. As the party with the burden of proof on the discovery rule, the plaintiff must come forward with affirmative, admissible evidence to establish why he did not and should not have discovered a possible claim any earlier than six months before filing his claim.

It is on this point—the burden of proof—that the Majority's invention of new facts and arguments is most damaging. If, as the Majority argues, Plaintiff should not have discovered a possible claim against Dr. Mishra until he learned that his kidney failure was progressive rather than acute, it was incumbent upon *Plaintiff* to advance that position, and the record support for that position, in the trial court. It is a disservice to the adversarial process to have an error-correcting intermediate court backfill the arguments necessary to satisfy Plaintiff's burden of proof, and leave Defendants to identify and refute those

arguments only on application to this Court. In other words, had Defendants known that they carried the burden of disproving the discovery rule invoked by Plaintiff, or if Plaintiff had argued below anything remotely resembling the arguments made by the Majority on Plaintiff's behalf, Defendants would have explained why the knowledge base identified by the Majority is not in fact necessary to the discovery of a possible cause of action in this case. Defendants provide this explanation now in this application, but that is cold comfort when Defendants did not have the opportunity to do so before the Majority issued a published opinion ruling against Defendants on the basis of arguments not made below and facts not appearing in the record.

The published nature of the Majority Opinion only compounds this manifest injustice, as it signals to other plaintiffs, other trial courts and other panels of the Court of Appeals that defendants have the burden of showing the inapplicability of the discovery rule, contrary to the express language of § 5838a(2). The Majority Opinion must be vacated because it contradicts the statutory burden of proof imposed by the Legislature.

G. The Majority Opinion relies on strawman arguments and facts outside of the record.

The Majority Opinion should not be allowed to stand as binding precedent because its reasoning and the basis for the conclusions it reaches are fundamentally flawed and not borne of the adversarial process, forming a poor foundation upon which to build Michigan's discovery rule jurisprudence.

First, the Majority Opinion sets up a strawman to explain why the trial court in this case reached the wrong result. Without any discussion of the basis for the trial court's grant of summary disposition, the Majority simply asserts that the trial court improperly

applied a "could have discovered" standard, rather than the "should have discovered" standard found in the text of § 5838a. Using dictionary definitions of "should" and "could," the Majority posits that the correct inquiry is whether it is "probable," and not merely "possible," for a reasonable lay person to have discovered by existence of a claim (**Exhibit A**, p 2). Like so many portions of the Majority Opinion, this argument appears nowhere in the arguments of the parties below. Nor has this criticism ever appeared, to Defendants' knowledge, in any Michigan decisions applying the discovery rule.[5] Instead, this "plain language" strawman is set up and knocked down by the Majority to lend legitimacy to its new discovery rule. It allows the Majority to simply assign error to the trial court's ruling and attribute that error to a "misinterpretation" of § 5838's plain language, rather than explain how the trial court actually misapplied the *Solowy* standard to the facts of this case,

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[5] A similar argument appears in the dissenting opinion by Justice Dickson of the Indiana Supreme Court in *Overton v Grillo*, 896 NE2d 499, 504-505 (Ind 2008):

> It isn't enough that the facts "might" or "*could*" lead to such discovery, or that a mere *possibility* or potential malpractice is raised by such facts. No, *Booth* requires that the facts *should lead* or would have led to discovery of malpractice. An injured plaintiff is not required to suspect, investigate, or commence litigation unless the facts known are sufficiently significant as to create a *reasonable probability* that malpractice had occurred.
>
> But the majority today departs from *Booth* and appears to require a plaintiff to file a medical negligence lawsuit whenever the facts known to the plaintiff create a *mere possibility* that medical malpractice might have been involved. In contrast to the "*should lead" standard* established in *Booth*, the majority requires only "enough to put the plaintiff on inquiry notice of the *possibility* of malpractice.

(Emphasis supplied). In *Overton*, the Court held that a breast cancer patient should have discovered her cause of action based on a misread mammogram when she was later diagnosed with advanced breast cancer, even though the initial mammogram was performed as a routine screening and was not prompted by any complaints of breast pain.

or how the *Solowy* standard (as applied by other panels of the Court of Appeals to the factually similar cases described above) is itself based on a misinterpretation of the statutory language. Again, Defendants are left to defend a criticism of the trial court's ruling—cloaked in the apparent legitimacy of statutory interpretation—that was not articulated below.

To flesh out the bones of their newly-created strawman and satisfy Plaintiff's burden of proof, the Majority goes beyond the facts and arguments of record to conduct independent medical research into the nature and progression of kidney disease. Plaintiff did not argue in either the trial court or the Court of Appeals that he thought his renal failure was an acute condition rather than the end stage of a progressive disease, or that he learned this distinction in September 2012 during his conversation with Dr. Tayeb. Had he done so, this would not have satisfied Plaintiff's burden of proof because, as the Dissenting Opinion correctly observes, it was not necessary for Plaintiff to know whether his kidney failure was the result of a slowly progressing condition, rather than an acute incident, to know of a possible cause of action:

> [P]laintiff knew that he had elevated kidney test levels. He also knew that Dr. Mishra performed an ultrasound test on his kidneys, which would have alerted a reasonable person to the fact that there may be an issue with his or her kidneys. In spite of plaintiff's elevated kidney levels and the ultrasound test, Dr. Mishra informed plaintiff that his kidneys were fine and that there was nothing to worry about. Plaintiff should have known he had a possible cause of action when he learned that he had kidney disease, in spite of Dr. Mishra's statements to the contrary. Plaintiff's kidney failure was not a sudden event disconnected to his previous medical diagnoses and treatment. Instead, plaintiff was aware of the fact that Dr. Mishra was monitoring his kidneys and that he had elevated kidney levels, and he knew that Dr. Mishra performed an ultrasound test specifically to ensure that there was no issue with his kidneys. Therefore, plaintiff should have known of a possible cause of action when he learned that he had kidney failure on January 3, 2011.

(**Exhibit B**, p 3).

To escape this straightforward application of the *Solowy* standard to the facts of this case, the Majority downplays the significance of the testing performed and known to Plaintiff, using broad generalizations which are outside of the record and would have been refuted by Defendants given the opportunity to do so. The Majority characterizes the kidney ultrasound as a "non-invasive, commonly-administered kidney imaging study," making it sound no more noteworthy than a blood pressure screening (**Exhibit A**, p 6). The Majority ignores that Plaintiff knew the ultrasound was performed in 2009 to check his kidney health after his "kidney number" came back slightly elevated, that Plaintiff did in fact recall the ultrasound and why it was performed, and that Plaintiff was told in 2009 that his kidneys were normal or "fine" based on the results of the ultrasound. Only by characterizing Plaintiff's theory as dependent upon the acute versus progressive nature of kidney disease can the Majority dismiss the importance of the fact that, two years before learning his kidneys were "shot" and his "kidney number" was "way past" the point where he should have been on dialysis, Plaintiff knew Dr. Mishra had tested his kidney function and had deemed it "fine." The Majority grasps at straws in footnote 10 of the Majority Opinion, making the nonsensical assertion that Plaintiff needed Dr. Tayeb to tell him that the kidney ultrasound and biopsy done in January 2011 to diagnose Plaintiff's renal failure (which Plaintiff remembers being performed), were in fact "related to his disease" (Id. at 7, fn 10). The Majority is working awfully hard, making arguments not made or even hinted at by Plaintiff, to meet Plaintiff's burden of proof in this case.

The Majority asserts that Defendants are relying on the "normal" ultrasound test to argue that the "routine" testing of any organ should put a patient on notice of a potential malpractice claim if that organ later becomes diseased (Id. at 7). This was not and is not Defendants' argument, and the Majority's ability to knock down this strawman does not aid in its efforts to craft a viable argument for Plaintiff, when Plaintiff here knew that the kidney ultrasound was done in response to his elevated "kidney number" to determine whether his kidneys were functioning properly.

The Majority similarly dismisses the significance of Plaintiff's bloodwork to test creatinine and other indicia of kidney function, characterizing it as "annual" (it was actually tested 2-3 times per year between 2007 and 2011), and irrelevant, because Plaintiff allegedly did not know the clinical significance of "creatinine" and did not know that Dr. Mishra was testing his creatinine (Id. at 6-7). The Majority asserts that an "extensive investigation," involving the acquisition of Plaintiff's medical records and clinical research to determine whether there were signs of progressive kidney disease in those records, would be required for Plaintiff to have known of a possible cause of action in January 2011. This is yet another strawman standard created by the Majority from whole cloth and extra-record research, and it does not reflect the parties' actual arguments in this case or the record evidence. Plaintiff's own deposition testimony indicates that he knew Dr. Mishra was testing his creatinine, which he may or may not have realized at that time was the "kidney number" referred to by Dr. Mishra. But, as recognized by the Dissenting Opinion, it is undisputed that Dr. Mishra told Plaintiff (in layman's terms) that he had a "kidney number," that that number had in 2009 been tested via his regular bloodwork and had

come back elevated, and that the subsequent test performed (a *kidney* ultrasound) formed the basis for Dr. Mishra's assurance that Plaintiff had nothing to worry about with respect to his kidneys (**Exhibit B,** pp 3-4). Even if Plaintiff did not know that Dr. Mishra was subsequently continuing to monitor his "kidney number," he should have known in January 2011 that he had a possible cause of action because the doctors and nurses told him that his "kidney number" was way past the point where Plaintiff should have been on dialysis. A reasonable person in Plaintiff's position should then have known that either Dr. Mishra should have been monitoring Plaintiff's "kidney number" and was not, or that Dr. Mishra had continued to monitor Plaintiff's 'kidney number," but had failed to inform him about the results. Either conclusion would support a possible cause of action, and neither requires any degree of "extensive investigation" into Plaintiff's medical records or the pathophysiology of kidney disease.

H. The Majority Opinion ignores Plaintiff's duty to use reasonable diligence to discover a possible claim

For all of its purported analysis regarding the correct discovery rule standard, the Majority Opinion is notably silent as to the requirement that a plaintiff exercise reasonable diligence to discover his or her cause of action. In *Gebhardt*, this Court held that "[w]here the discovery rule is found appropriate, a plaintiff is deemed to have discovered a cause of action when the plaintiff discovers, *or through the exercise of reasonable diligence should have discovered*, an injury and its possible cause. 444 Mich at 545 (emphasis supplied). "Even under the discovery rule, *a claimant must take diligent steps to discover a cause of action* and cannot simply wait for others to inform him or her of the existence of a cause of action. *Turner*, 210 Mich App at 353 (emphasis supplied). Plaintiff argued below that he

exercised reasonable diligence to discover his claim because he met with a medical malpractice attorney only five days after his meeting with Dr. Tayeb. Curiously, the Majority does not adopt this position, but rather omits any discussion of what the standard of reasonable diligence requires in a case involving a progressive disease condition.

Assuming *arguendo* that Plaintiff was required to gain some understanding of how kidney disease worked in order to discover his possible cause of action, it does not follow that Plaintiff failed to acquire, or should not have acquired, that understanding at some point during the 20 months between his diagnosis with end-stage renal failure and his asserted date of discovery. The Majority asserts that "[o]ne would be hard pressed to find a reasonable, ordinary person, who is not a medical professional, who knows what creatinine is or what an abnormal creatinine level means, in addition to knowing how kidneys fail, why they fail, and how quickly they can fail" (**Exhibit A**, p 7). This statement, essential to the Majority's holding, is (1) speculative, (2) based on arguments not advanced by the parties, and (3) easily disproven by a simple Google search for "kidney disease," directing the reader to WebMD's "A to Z Guide" for "Understanding Kidney Disease—the Basics,"[6] an article written in laymen's terms answering each of the questions posed by the Majority Opinion. This information, available within ten seconds to anyone with an internet connection, is what the Majority asserts that a reasonable, ordinary person who is not a medical professional does not and should not be expected to learn when diagnosed with kidney disease. It is simply incredible that, in this day and age, the Majority denies that the

[6] http://www.webmd.com/a-to-z-guides/understanding-kidney-disease-basic-information#1 (accessed November 6, 2016).

exercise of reasonable diligence required of a medical malpractice plaintiff to discover his or her cause of action includes a simple internet search of his or her condition.[7] The Majority Opinion applies the discovery rule, as binding precedent, as though fundamental information regarding medical conditions and disease processes were only available through medical journals or learned medical professionals. That may have been the case when the discovery rule was first enacted in the 1980s, but it is certainly not the case today. This is yet another example of why the Majority Opinion must be vacated, as a shaky foundation upon which to develop Michigan's discovery rule jurisprudence.

I. The Majority Opinion threatens the availability of the statute of limitations defense in cases involving primary care doctors who allegedly fail to diagnose diseases through routine tests.

While the Majority Opinion is certainly incorrect in its resolution of the statute of limitations analysis in the instant case, its analysis and implications threaten the availability of the statute of limitations defense in other cases involving primary care physicians, for which this case will serve as binding precedent. As the availability of primary care services increases due to the expansion of insurance coverage for such care, the number of potential lawsuits premised upon alleged malpractice in providing those services will surely increase as well. The core of a primary care physician's practice (and thus the core of his or her potential malpractice exposure) is the long-term monitoring and assessment of potential disease processes, including routine bloodwork and screening

[7] Again, had Plaintiff actually advanced this argument to satisfy his burden of proof, Defendants would have provided record evidence indicating that Plaintiff could and did perform internet research regarding his condition, namely regarding kidney transplants (**Exhibit E**, pp 66-67).

procedures. As described above, the Majority dismisses the significance, for purposes of the statute of limitations, of Plaintiff's "commonly-administered" kidney ultrasound, ordered by Dr. Mishra in response to Plaintiff's rising lab values to rule out kidney disease (**Exhibit A**, p 6). In the Majority's view, a "normal" result from a test performed to rule out a certain disease process or condition should not give rise to a possible claim of malpractice when the patient is later diagnosed with the very condition screened for, and ruled out, by the test (Id.). But this is the same set of operative facts likely to be involved in most failure-to-diagnose cases brought against primary care physicians, arising out of "normal" PSA screenings (as in *Paluda*, *supra*) or mammograms (as in *Horton*, *supra*)—both of which are more routinely performed than kidney ultrasounds. Under the Majority Opinion, the statute of limitations would continue to run under the discovery rule until a later treater or an attorney explicitly informed the plaintiff that he or she had a possible cause of action against the primary care physician for a failure to diagnose, as the "normal" test result, followed by a subsequent positive diagnosis, should not cause the plaintiff to discover a possible cause of action.

Such extended liability is precisely what the Legislature intended to avoid by enacting the two-year statute of limitations in § 5838a and limiting the discovery rule exception to six months. See *Larson*, 427 Mich at 311 (recognizing relief of the prolonged fear of litigation as a policy goal underlying statutes of limitation); see also *McKiney v Clayman*, 237 Mich App 198, 203-204; 602 NW2d 612 (1999) (noting Legislature's abrogation of "last treatment rule" with respect to medical malpractice claims arising after

1986). This is particularly important for primary care physicians such as Dr. Mishra, whose 20-year physician-patient relationship with Plaintiff is typical for that specialty.

The "routine" nature of most primary care visits, including and especially the blood work that the Majority likewise dismisses as unremarkable and unimportant, implicates the statute of limitations' importance as protection against cases in which the plaintiff's memory has faded. In other words, if, as here, Plaintiff can avoid discovery of his medical malpractice claim by virtue of his fading memory regarding what Dr. Mishra may have told him over a three-year span about his creatinine values and his diagnosis in 2007 of chronic renal insufficiency, then the purpose of the statute of limitations is undercut, and is likely to be undercut in similar cases if the Majority Opinion stands.

ARGUMENT II

THE TRIAL COURT PROPERLY DISREGARDED AS HEARSAY PLAINTIFF'S AFFIDAVIT PURPORTING TO ESTABLISH THAT PLAINTIFF DID NOT DISCOVER HIS MALPRACTICE CLAIM UNTIL SEPTEMBER 2012.

This Court need not reach the question of the admissibility of Plaintiff's affidavit regarding his purported conversation with Dr. Tayeb because, as explained in Argument I, *supra*, even assuming *arguendo* that admissible evidence exists as to the conversation regarding the delay in Plaintiff's referral to a nephrologist, that evidence would not change the outcome of the statute of limitations analysis because the objective facts establish that Plaintiff knew or should have known of his possible claim against Defendants in January 2011, well before six months prior to the filing of Plaintiff's claim in March 2013. Michigan's objective discovery rule is not affected by Plaintiff's self-serving assertion that he subjectively was not aware of his claim until his September 2012 conversation with Dr. Tayeb. In *Thompson v Drayer*, Court of Appeals Docket No. 200126, *rel'd* Sept. 25, 1998; 1998 WL 1989875 (unpublished) (**Exhibit N**), the Court of Appeals found harmless error (assuming *arguendo* error existed) in a trial court's failure to consider the plaintiff's affidavit regarding her actual knowledge of the possible cause of action against the defendant for purposes of the six-month discovery rule. Under *Solowy*, the plaintiff's actual knowledge was irrelevant to the determination, according to the facts in her complaint, of when the discovery period commenced. 454 Mich at 222. Here too, Plaintiff's actual knowledge in September 2012 is irrelevant when the facts as alleged in his complaint indicate that he should have known of the existence of a potential cause of action in January 2011.

The trial court otherwise properly rejected Plaintiff's affidavit and its contents as inadmissible hearsay (**Exhibit F**, p 4). While Plaintiff and the Majority assert that the statements attributed to Dr. Tayeb are not hearsay because they are not being offered for the truth of the matter asserted (**Exhibit A**, pp 7-8 fn 11), when the statements were discussed at the summary disposition hearing, Plaintiff counsel indicated that Dr. Tayeb's assertions provided the factual basis for Plaintiff's discovery of his possible claim against Defendants in September 2012, before which time he allegedly had no reason to believe that earlier referral to a nephrologist could have prevented his kidney failure (**Exhibit G**, pp 13-15). If the statements attributed to Dr. Tayeb were not being offered for the truth of the matter asserted (what caused Plaintiff to discover his cause of action), then the affidavit would be of no use to create an issue of fact for the jury to decide as to when Plaintiff should have discovered his possible claim. The trial court did not abuse its discretion in excluding the affidavit, nor would consideration of the affidavit have changed the outcome of the statute of limitations analysis.

Lastly, Plaintiff acknowledged in the Court of Appeals that any error in the exclusion of the affidavit would necessarily be harmless as it is merely cumulative of his deposition testimony regarding his alleged conversation with Dr. Tayeb (**Exhibit D**, pp 80-84) (Plaintiff's brief on appeal, p 32). *Campbell v Human Services Dep't*, 286 Mich App 230, 246; 780 NW2d 586 (2009).

RELIEF REQUESTED

WHEREFORE, Defendants-Appellants respectfully request this Court vacate the Court of Appeals Majority Opinion, adopt the Dissenting Opinion authored by Judge Jansen, or alternatively grant leave to appeal and reinstate summary disposition for Defendants.

Respectfully submitted,

PLUNKETT COONEY

By: /s/ Karen E. Beach

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Dated: November 7, 2016

STATE OF MICHIGAN

IN THE SUPREME COURT

KERRY JENDRUSINA,

Plaintiff-Appellee,

v

SHYAM MISHRA, M.D., and
SHYAM N. MISHRA, M.D., P.C.,
Jointly & Severally,

Defendants-Appellants.
_____/

SC No. _____
COA No. 325133
LC No. 13-3802-NH
(Macomb Circuit Court)

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

MONIQUE VANDERHOFF deposes and says that she is an employee with the firm of PLUNKETT COONEY, and that on November 7, 2016, she caused to be served a copy of the attached Notice of Filing Application, Application for Leave to Appeal and Proof of Service/Statement Regarding E-Service, upon the following:

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The undersigned further states that the *Notice of Filing Application* was served upon the following courts:

Clerk of the Court Macomb County Circuit 40 N. Gratiot Avenue Mt. Clemens, MI 48043	**The trial court was served via U.S. Mail, all postage prepaid**
Michigan Court of Appeals	**Served via Court of Appeals' TrueFiling System**

/s/Monique Vanderhoff
MONIQUE VANDERHOFF

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STATE OF MICHIGAN

IN THE SUPREME COURT

KERRY JENDRUSINA,

Plaintiff-Appellee,

v

SHYAM MISHRA, M.D., and
SHYAM N. MISHRA, M.D., P.C.,
Jointly & Severally,

Defendants-Appellants.
_____/

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INDEX OF EXHIBITS TO APPLICATION FOR LEAVE TO APPEAL

EXHIBIT	DESCRIPTION
A	August 4, 2016 Court of Appeals Majority Opinion
B	August 4, 2016 Court of Appeals Dissenting Opinion
C	Complaint
D	May 29, 2014 deposition of Plaintiff
E	Affidavit of Plaintiff
F	December 23, 2013 Order denying Defendants' motion for summary disposition
G	Transcript of September 29, 2014 summary disposition hearing
H	October 23, 2014 Opinion and Order granting Defendants' motion for summary disposition
I	November 26, 2014 Order denying Plaintiff's motion for reconsideration
J	September 26, 2016 Order denying Defendants' motion for reconsideration

EXHIBIT	DESCRIPTION
K	*Paluda v Associates of Internal Medicine, PC*, Docket No. 303789, *rel'd* June 21, 2012; 2012 WL 2362405 (unpublished)
L	*Zimnicki v Rollins*, Court of Appeals Docket No. 217900, *rel'd* Dec. 26, 2000; 2000 WL 33388547 (unpublished)
M	*Horton v St John Health System-Detroit-Macomb Campus*, Court of Appeals Docket No. 222952, *rel'd* Nov. 6, 2001; 2001 WL 1388352 (unpublished)
N	*Thompson v Drayer*, Court of Appeals Docket No. 200126, *rel'd* Sept. 25, 1998; 1998 WL 1989875 (unpublished)

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EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

KERRY JENDRUSINA,

Plaintiff-Appellant,

v

SHYAM MISHRA, M.D. and SHYAM N. MISHRA, M.D., P.C.,

Defendants-Appellees.

FOR PUBLICATION
August 4, 2016
9:00 a.m.

No. 325133
Macomb Circuit Court
LC No. 2013-003802-NH

Before: GLEICHER, P.J., and JANSEN and SHAPIRO, JJ.

SHAPIRO, J.

Plaintiff Kerry Jendrusina filed this medical malpractice case against his primary care physician, Dr. Shyam Mishra, a specialist in internal medicine. Defendant filed a motion for summary disposition asserting that the Notice of Intent, and therefore the complaint, had not been timely filed. Plaintiff responded that the claim had been initiated within the six-month discovery period defined by the Legislature in MCL 600.5938a. That statute provides in pertinent part: "[A]n action involving a claim based on medical malpractice . . . may be commenced . . . within 6 months after the plaintiff discovers or *should have* discovered the existence of the claim[.]" MCL 600.5938a(3) (emphasis added). The trial court granted defendant's motion finding that claim was not timely. In so ruling, the trial court effectively substituted the phrase *"could have"* for *"should have"* in the statute. Because we are to follow the text of the statute as written, we reverse and remand.

On January 3, 2011, plaintiff went to the hospital with flu-like symptoms. He was found to be dehydrated and after performing various tests, the hospital staff determined that plaintiff was in irreversible kidney failure. As a result he was placed on lifetime dialysis with its attendant morbidity and mortality.

Plaintiff asserts that defendant failed to take action as required by the relevant standard of care, such as a referral to a nephrologist (kidney specialist), despite the fact that for several years plaintiff's blood tests—contained within plaintiff's medical chart maintained by Dr. Mishra—demonstrated worsening and eventually irreversible kidney disease. Plaintiff further asserts that had Dr. Mishra complied with the standard of care, plaintiff's irreversible kidney failure would have been avoided.

According to plaintiff, he did not discover the existence of his claim until September 20, 2012. On that date, plaintiff was seen by Dr. Jukaku Tayeb, a treating nephrologist. According to plaintiff's testimony:

> [Dr. Tayeb] came in and what it was, he got full biopsy, not just a short version out of Clinton Henry Ford, out of Detroit. He got that and he read through it and reviewed the case and talked to the pathologist, I guess, and he goes, "I got your full pathology report here," and he goes, "Did your doctor—why didn't you come to a nephrologist?" I said I was with an internist. The internist said everything was fine . . . . Then he started ranting, saying, "The doctor should have sent you. I could have kept you off dialysis. You should have come here years ago. I could have prevented you from being on dialysis and you going into full kidney failure, if you would have come to a nephrologist early on."

Plaintiff testified that when Dr. Tayeb told him this, he "was shocked. I was dumbfounded. That was like someone punching me in the gut." He testified that before that conversation with Dr. Tayeb he did not know his kidney failure had developed over years and could have been avoided with an earlier referral and treatment. He testified that until then "I thought it happens, it happens." He testified that immediately after this visit with Dr. Tayeb he called his wife and said "Oh, my God. I think Mishra screwed up" and the following day he contacted an attorney. Calculating the six-month discovery period from September 20, 2012, plaintiff timely initiated this case. The trial court concluded, however, that plaintiff should have discovered the existence of his claim when he was diagnosed with kidney failure in January 2011.

In reviewing the trial court's analysis we must be strictly guided by the language of the statute. "If the language of a statute is clear and unambiguous, this Court must enforce the statute as written." *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011).

> Our function in construing statutory language is to effectuate the Legislature's intent. Plain and clear language is the best indicator of that intent, and such statutory language must be enforced as written. [*Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012).]

Significantly, we note that the legislature chose the phrase "should have" rather than "could have" in the statutory text. According to the New Oxford American Dictionary (3rd ed), "could" is "used to indicate *possibility*" whereas "should" is "used to indicate what is *probable*." (Emphasis added).[1] Thus, the inquiry is not whether it was *possible* for a reasonable lay person to have discovered the existence of the claim; the inquiry is whether it was *probable* that a reasonable lay person would have discovered the existence of the claim.

Plaintiff's medical chart maintained by Dr. Mishra includes the results of his routine blood tests. Beginning in 2007, lab reports filed within the chart consistently contained

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[1] Other dictionaries provide consistent definitions. Merriam-Webster's Collegiate Dictionary (11th ed) defines "could" as "an alternative to *can* suggesting less force or certainty" (emphasis in original) and "should" as "used in auxiliary function to express obligation." Random House Webster's College Dictionary (2nd ed) defines "could" as "used to express conditional possibility or ability" and "should" as "used to indicate duty, propriety, or expediency."

abnormal and worsening levels of two blood measures related to kidney function: *creatinine*[2] and *eGFR*.[3]

While these test results are clearly relevant to the issue whether Dr. Mishra complied with the standard of care, they are not relevant to when plaintiff should have discovered his potential claim unless there is evidence that plaintiff was made aware of the repeated and increasingly abnormal findings of kidney disease. Defendant offers no evidence that this was the case. First, on this record it is undisputed that defendant's office never provided plaintiff with copies of his lab reports. Second, plaintiff testified that defendant never told him that he had kidney disease or that he might develop kidney disease. Indeed, given defendant's failure to introduce contrary evidence, defendant has not even created a question of fact on the issue.[4]

Defendant points out that in a 2008 office note, Dr. Mishra wrote down a diagnosis of "chronic renal failure." However, the note contains no reference to a discussion of this with the patient, i.e. plaintiff, and plaintiff testified that no such discussion ever occurred. Specifically, plaintiff testified as follows:

> *Q.* I'm looking at your records from Dr. Mishra's office, December 22nd, 2008, so this would have been a few days before Christmas at the end of 2008. Dr. Mishra had diagnosed you with chronic renal failure; do you remember that?
>
> *A.* No, he never told me that.
>
> *Q.* You don't remember having any discussion with him about that then?
>
> *A.* No, not at all.
>
> *Q.* You had swelling in your legs at that time. Do you remember that?
>
> *A.* Yes. He said it was because of my weight problem.

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[2] Creatinine is a waste product of muscle metabolism that is normally filtered out by the kidneys and discharged in urine. Standard blood test panels include a measure of creatinine in the blood. According to the record before us, normal blood levels of creatinine are in the range of 0.5 to 1.3. If creatinine levels go above that range it suggests that the kidneys are not adequately filtering creatinine which may be a sign of kidney failure. According to Dr. Mishra's records, plaintiff's creatinine level in 2007 was 1.5. Over the next several years, plaintiff's creatinine level, according to Dr. Mishra's chart, grew increasingly elevated until by the end of 2010 it was at 4.99.

[3] The lab measure known as eGFR refers to "estimated glomerular filtration rate" and should normally be greater than 60. Beginning in 2007, plaintiff's level fell below 60 and continued to decrease over the next five years until it was measured at 12 in 2011.

[4] Even if there was a question of fact, it should be resolved by the jury, not by the trial court on a motion for summary disposition. See *Kincaid v Cardwell*, 300 Mich App 513, 523; 834 NW2d 122 (2013).

Q. So you don't remember any discussion December 2008 about having chronic renal failure?

[objection omitted.]

A. No.

Q. When is the first time you recall having a discussion with Dr. Mishra about kidney failure?

A. He never discussed it with me . . . .

Defendant has not submitted any evidence indicating that, contrary to plaintiff's testimony, he discussed this diagnosis with plaintiff. As noted, the office chart does not indicate that the diagnosis was relayed or discussed with the patient and it is undisputed that plaintiff neither saw or had copies of those records until after he retained an attorney, immediately following the September 20, 2012 conversation with Dr. Tayeb[5].

In *Solowy v Oakwood Hosp*, 454 Mich 214, 221-222; 561 NW2d 843 (1997), our Supreme Court held that what the claimant discovered or should have discovered is "a possible cause of action." This point was critical in *Solowy* because in that case the plaintiff did not dispute that she knew her doctor might have committed malpractice. See *id.* at 225. Instead, she argued that the six-month timeframe was not triggered until she had, in her own mind, confirmed that this was the case. *Id.* at 218-219. The facts of *Solowy* merit description. In 1986, the plaintiff had had a skin cancer on her ear. *Id.* at 216. The defendant excised it and, according to the plaintiff, he told her in the same year that the cancer was "gone." *Id.* at 216-217. Then in 1992, the plaintiff discovered a similar lesion on her ear at the same site, but she took no action for some time because of the defendant's assurance that the cancer was gone. *Id.* at 217-218. Eventually she went to a new doctor who advised that the new lesion was either a recurrence of the prior cancer or a benign lesion. *Id.* at 217. A biopsy showed that it was a recurrence and the plaintiff claimed that a more invasive surgery was required due to the defendant's incorrect assurance to her that the cancer was gone. *Id.* at 217-218. The plaintiff filed suit less than six months from the date of the biopsy, but more than six months from the date the second doctor told her that the lesion might be a recurrence of her cancer. *Id.* at 218.

The plaintiff argued that even though she knew that she had a *possible* cause of action after being so advised, it was only after the biopsy that she knew or should have known that she had an *actual* cause of action. *Id.* at 224-225. She argued that had the biopsy been benign she would have learned that her possible cause of action was, in fact, not a cause of action. *Id.* The *Solowy* Court concluded that the discovery date is when the plaintiff learns of a "possible cause of action" rather than learning of a "certain" cause of action. *Id.* at 221-222. However, the *Solowy* Court continued to apply the "should have" standard, stating:

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[5] In addition, despite the fact that defendant obtained an order to conduct ex parte meetings with plaintiff's physicians, the record contains no testimony or affidavits from any of these physicians that prior to the September 20, 2012 conversation with Dr. Tayeb, they advised plaintiff that his kidney disease could or should have been recognized and treated years earlier by Dr. Mishra.

> the discovery rule begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action. [*Id.* at 222.]

In *Solowy*, the time began to run when the plaintiff learned that there was a significant chance—in *Solowy* it was 50/50—that her doctor had committed malpractice. She knew that if her diagnosis was skin cancer that she had grounds to file suit because she had previously had skin cancer at that location, it had been treated, and her doctor told her that it was "gone." *Id.* at 217, 224.

In the instant case, the record does not support the view that, when diagnosed with kidney failure, plaintiff "should have known of a possible cause of action." As far as he knew, he had no previous history of kidney disease and did not know of the lab reports showing that his kidney failure was the result of a slowly progressing condition rather than an acute event. In *Solowy,* the plaintiff knew that her doctor might have committed malpractice as soon as the tumor grew back; she was only waiting to learn whether she was in fact injured as a result of his actions. In this case, the opposite is true; after diagnosis in January 2011, plaintiff knew he was sick, but lacked the relevant data about his worsening lab reports and the medical knowledge to know that his doctor might have committed malpractice. The critical difference between the plaintiff in this case and the plaintiff in *Solowy* is that in *Solowy* the plaintiff neither required nor lacked special knowledge about the nature of the disease, its treatment, or its natural history.[6] She knew exactly what her relevant medical history was at all times. She simply delayed pursuing her claim in order to wait for final confirmation of what she already knew was very likely true. Moreover, the *Solowy* plaintiff had visible symptoms that were clearly recognizable as a likely recurrence of her skin cancer long before the ultimate diagnosis. Here, plaintiff's first recognizable symptom, i.e. urine retention, did not occur until January 2011 when it precipitated his hospitalization.

"[T]he discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action." *Id.* at 222. An objective standard, however, turns on what a reasonable, ordinary person would know, not what a reasonable physician (or medical malpractice attorney) would know. Thus, the question is whether a reasonable *person*, not a reasonable *physician* would or should have understood that the onset of kidney failure meant that the person's general practitioner had likely committed medical malpractice by not diagnosing kidney disease.

Indeed, defendant does not contend that a reasonable lay person understands the anatomy, physiology, or pathophysiology of kidneys. One would be hard pressed to find a reasonable, ordinary person, who is not a medical professional, who knows what creatinine is or what an abnormal creatinine level means, in addition to knowing how kidneys fail, why they fail, and how quickly they can fail.[7]

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[6] "Natural history" is a medical term meaning the expected course of a disease absent treatment. See Merriam-Webster's Collegiate Dictionary (11th ed). For example, whether kidney failure can occur suddenly or only over an extended period of time requires knowledge of the "natural history" of kidney disease.

[7] Our dissenting colleague suggests that any reasonable person would know that kidney failure must develop over a long period. She offers no grounds for such a conclusion. Moreover, her

Moreover, plaintiff did not visit Dr. Mishra specifically for kidney problems. He saw him as a primary care provider for over 20 years. Unlike the plaintiff in *Solowy*, plaintiff never had surgery or even any treatment for the relevant organ or condition. He had routine complete blood counts and metabolic lab work done, as does virtually every patient who undergoes annual physicals. There is no evidence that he ever saw the blood test reports that showed the normal reference ranges, which would have revealed that his creatinine levels were high, or that he was ever advised of the relationship between creatinine level and kidney disease. Defendant suggests that because he once ordered a kidney ultrasound for plaintiff after an episode of edema and one slightly elevated lab report in 2008, plaintiff should have realized upon diagnosis of kidney failure that he had kidney disease back in 2008. However, the ultrasound was reported as normal.[8] Assuming that a reasonable, ordinary person would even recall a normal ultrasound performed years earlier, there is no reason that such a person would consider a *normal* ultrasound result as evidence that Dr. Mishra was at the time simultaneously committing malpractice in some manner. Rather, the normal ultrasound rationally supported that Dr. Mishra had made no errors at all. The mere *performance* of a non-invasive, commonly-administered kidney imaging study yielding a normal result, does not constitute an "objective fact" from which plaintiff should have surmised that he had a possible cause of action when later diagnosed with kidney failure. See *Solowy*, 454 Mich at 222.

It was *possible* for plaintiff to have discovered the existence of a possible claim shortly after presenting to the hospital and being told that he had kidney failure. To have done so, however, he would have had to have undertaken an extensive investigation to discover more information than he had. Presumably, plaintiff could (1) studied the various causes and speeds

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assertion is inconsistent with medical knowledge. Kidney failure can occur very quickly and has several possible causes such as reduction in blood flow, allergic reaction, infection, adverse reaction to medication, dehydration, stones, cancer, nerve damage and others. See http://www.mayoclinic.org/diseases-conditions/kidney-failure/basics/causes/con-20024029 (accessed April 28, 2016). And contrary to the dissent's claim, we do not cite this medical text to justify plaintiff's belief; we do so to refute the dissent's claim that plaintiff's belief was inconsistent with science and therefore unreasonable.

[8] The dissent suggests that plaintiff was "consistent[ly]" told by Dr. Mishra that his blood tests were being done specifically due to concern about his kidneys and that after each test, Dr. Mishra assured plaintiff that his kidneys were fine. However, this suggestion is not consistent with the record. As already noted, plaintiff testified that he was told only once, in late 2008, that his "kidney number" on a single blood test was a little high and that he was correctly advised that an ultrasound done to follow up was normal. There is *no* testimony that Dr. Mishra thereafter discussed plaintiff's kidney health with him except in notifying him that his annual blood tests, which included many non-kidney tests, were normal. The dissent's characterization of these communications as revealing to plaintiff that he had "abnormal kidney level*s* (i.e. plural)" is inaccurate. There is a substantial and striking difference between a single conversation three years prior to diagnosis and a subject of repeated discussion. Thus, contrary to the dissent's argument, the 2012 diagnosis was not "plainly contradictory to everything Dr. Mishra had said up until that point." Dr. Mishra likely told plaintiff many things between 2008 and 2012. Regarding plaintiff's kidneys, there were but two conversations: one in 2008 referencing a mildly elevated test, and the accurate report of a normal kidney ultrasound in early 2009.

of progression of kidney disease, (2) requested copies of his previous years' blood test reports, and (3) considered whether there were signs of progressive kidney disease in those reports. However, there is no basis in statute, common law, or common sense to impute such a duty to people who become ill.

Defendant seems to suggest that the diagnosis of any serious illness in and of itself suffices to place on a reasonable person the burden of discovering a potential claim against a primary care physician if at any time in the past the physician *tested* an organ involved in a later diagnosis and reported normal results.[9] Certainly any new diagnosis or worsened diagnosis or worsened prognosis is an "objective fact," but it is a substantial leap to conclude that this fact alone *should* lead any reasonable person to *know* of a possible cause of action. We agree that anytime someone receives a new diagnosis, worsened diagnosis, or worsened prognosis, that individual *could* consider whether the disease could or should have been discovered earlier. Moreover, diligent medical research and a review of the doctor's notes may reveal that an earlier diagnosis should have been made. That, however, is not the standard. We must determine what the plaintiff "should have discovered" on the basis of what he knew or was told, not on the basis of what his doctors knew or what can be found in specialized medical literature. Thus, the elevated levels of creatinine in plaintiff's blood tests during prior years is of no moment given the absence of any evidence that plaintiff ever saw those reports or that he knew what the word "creatinine" meant, let alone the pathophysiology of kidney failure, its measures, its causes, its natural history, or its treatment.[10]

To hold as defendant suggests would not merely be inconsistent with the text of the statute. It would also be highly disruptive to the doctor-patient relationship for courts to advise patients that they "should" consider every new diagnosis as evidence of possible malpractice until proven otherwise. Had the legislature intended such a result it would have use the phrase "could have discovered," not "should have discovered."

On the present facts, defendant has demonstrated that before the September 20, 2012 meeting with Dr. Tayeb, plaintiff *could* have discovered that he had a possible cause of action for malpractice. However, the statute triggers the six-month discovery period only when plaintiff s*hould* have discovered that he had a possible cause of action. Given the plain language of the statute, the trial court erred in granting defendant's motion for summary disposition. [11]

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[9] The discovery rule does not incorporate the logical fallacy of *post hoc, ergo propter hoc* (after this, therefore because of this).

[10] Although plaintiff's kidney disease was diagnosed after he had undergone tests for kidney disease (among many other tests), it simply does not follow that the tests were related to his disease. More information was required to make that link, and that information was supplied by Dr. Tayeb.

[11] Plaintiff also challenges another ruling which we agree was erroneous. However, in light of our ruling the issue appears to be moot. Before being deposed plaintiff provided an affidavit to the trial court, averring, as he later did in his deposition, that he had spoken with Dr. Tayeb on September 20, 2012, and that, on that date, Dr. Tayeb informed him that had he been referred to nephrologist earlier, he may have delayed or avoided his current state of renal failure and

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher

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dialysis. More specifically, plaintiff averred that Dr. Tayeb stated that defendant's failure to refer plaintiff to a nephrologist was inappropriate and was a serious contributor to plaintiff's medical condition. Plaintiff presented this affidavit in his brief addressing the timeliness of his claim. The trial court refused to consider the affidavit on the grounds that it was inadmissible hearsay. This ruling was erroneous as matter of law given that the affidavit was not offered for the truth of the matter asserted by the declarant. See *People v Eggleston*, 148 Mich App 494, 502; 384 NW2d 811 (1986) (holding that statements were not hearsay because they were not introduced to prove the truth of the matter asserted). Plaintiff did not offer the evidence to prove that defendant was negligent and whether Dr. Tayeb's alleged statements were accurate is not relevant to the present issue. Plaintiff relied on Dr. Tayeb's alleged statement only to demonstrate how and why he became aware of his possible malpractice claim, not that Dr. Mishra was negligent or that his negligence was a proximate cause of any damages. The trial court, therefore, erred in ruling that the affidavit contained inadmissible hearsay for this purpose. See *id.*

EXHIBIT B

STATE OF MICHIGAN

COURT OF APPEALS

KERRY JENDRUSINA,

Plaintiff-Appellant,

v

SHYAM MISHRA, M.D., and SHYAM N. MISHRA, M.D., P.C.,

Defendants-Appellees.

FOR PUBLICATION
August 4, 2016

No. 325133
Macomb Circuit Court
LC No. 2013-003802-NH

Before: GLEICHER, P.J., and JANSEN and SHAPIRO, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent because I believe that the limitations period began to run when plaintiff learned that he had kidney failure in January 2011. Accordingly, I would affirm the trial court's order granting summary disposition in favor of defendants.

In 1988, defendant Dr. Shyam Mishra began treating plaintiff as his primary care physician. According to plaintiff's complaint, Dr. Mishra diagnosed him with renal insufficiency in 2007. The evidence presented by the parties establishes that Dr. Mishra began regularly testing plaintiff's kidneys at least as early as 2007. The tests continued on a regular basis. According to plaintiff, Dr. Mishra did not always communicate with plaintiff regarding his test results. Plaintiff testified that he did not know why Dr. Mishra was testing his kidneys, but he did know that Dr. Mishra was testing his kidney levels. He believed that the tests were connected with the edema he began to experience in 2008. He explained, "I didn't hear until the leg started swelling they were monitoring something for kidneys." Plaintiff testified that Dr. Mishra never informed him that he suffered from kidney failure or that he should see a nephrologist.

Plaintiff testified in his deposition that Dr. Mishra told him in 2008 that his kidney test results were not a cause for concern and that, although his kidney levels were a bit elevated, there was nothing to worry about because his "kidney number" was under five. In 2009, Dr. Mishra conducted an ultrasound of plaintiff's kidneys and told plaintiff that his kidneys were "fine." He did not tell plaintiff that plaintiff had chronic renal failure. On January 3, 2011, plaintiff reported to the hospital with flu-like symptoms. The emergency room doctors found that plaintiff was in kidney failure and diagnosed him with acute end-stage renal failure. Plaintiff began regular dialysis. More than 20 months later, on September 20, 2012, plaintiff had

a conversation with Dr. Tayeb, a nephrologist. Plaintiff testified that, during that conversation, Dr. Tayeb told him that he should have been sent to a nephrologist in 2008. Plaintiff testified that Dr. Tayeb stated:

> "The doctor should have sent you. I could have kept you off of dialysis. You should have came [sic] here years ago. I could have prevented you from being on dialysis and you going into full kidney failure, if you would have came [sic] to a nephrologist early on."

Following that conversation, on March 18, 2013, plaintiff provided Dr. Mishra and Dr. Mishra's practice with a notice of intent to sue. The present case was then filed on September 17, 2013. Relevant to this appeal, defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (10), arguing that the claim was time-barred under the statute of limitations. The trial court agreed with defendants and concluded that plaintiff should have discovered his claim by January 3, 2011. Therefore, the trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7), finding that plaintiff's claim was barred by the statute of limitations.

I respectfully disagree with the majority's conclusion that plaintiff should not have discovered his claim until he talked with Dr. Tayeb on September 20, 2012. It is undisputed that plaintiff's complaint fell outside of the general two-year statute of limitations in MCL 600.5805(6). Instead, plaintiff asserts that the alternate six-month discovery rule statute of limitations in MCL 600.5838a(2) should apply to his claims. The Michigan Supreme Court in *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 222; 561 NW2d 843 (1997), explained that "the plaintiff need not know for certain that he had a claim, or even know of a likely claim before the six-month period would begin." Instead, the plaintiff merely needs to know of a *possible* cause of action. *Id.* The rule does not require a plaintiff to be able to prove every element of a cause of action in order for the limitations period to begin running. *Id.* at 224. The Court explained, "In applying this flexible approach, courts should consider the totality of information available to the plaintiff, including his own observations of physical discomfort and appearance, his familiarity with the condition through past experience or otherwise, and his physician's explanations of possible causes or diagnoses of his condition." *Id.* at 227. Our Supreme Court has also explained that "[t]he discovery rule applies to the discovery of an injury, not to the discovery of a later realized consequence of the injury." *Moll v Abbott Laboratories*, 444 Mich 1, 18; 506 NW2d 816 (1993). Additionally, "[t]his Court has held that the discovery rule does not act to hold a matter in abeyance indefinitely while a plaintiff seeks professional assistance to determine the existence of a claim." *Turner v Mercy Hosps & Health Servs of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995).

Plaintiff admits that he was aware that Dr. Mishra was testing his kidneys and that Dr. Mishra never said anything was wrong. He testified in his deposition that in 2008, Dr. Mishra told him that his "kidneys [were] a little bit elevated but not to the point where there was anything to worry about." In 2009, Dr. Mishra ordered an ultrasound test for plaintiff's kidneys, and Dr. Mishra informed plaintiff that the ultrasound indicated that plaintiff's kidneys were "fine." On January 3, 2011, when plaintiff became aware of this diagnosis that was so plainly contradictory to everything Dr. Mishra had said up until that point, he became "equipped with

sufficient information to protect [his] claim." See *Moll*, 444 Mich at 24. Thus, the limitations period expired six months after this date. See *id.*

Plaintiff argues that he was not able to make the connection between the new diagnosis and Dr. Mishra's alleged negligence until September 20, 2012. The Michigan Supreme Court has stated, however, that this connection is not necessary: "[T]he 'possible cause of action' standard does not require that the plaintiff know that the injury . . . was in fact or even likely caused by the [doctor's] alleged omissions." *Solowy*, 454 Mich at 224. Further, this Court has previously held that "[a] plaintiff must act diligently to discover a possible cause of action and 'cannot simply sit back and wait for others' to inform [him] of its existence." *Turner*, 210 Mich App at 353 (citation omitted). Considering this, it is plain that plaintiff should have discovered his potential claim on January 3, 2011. Therefore, the statute of limitations in MCL 600.5838a(2) expired six months after January 3, 2011. Plaintiff's notice of intent was delivered on March 18, 2013, which was well after the six-month limitations period.

The majority concludes that defendants failed to demonstrate that plaintiff should have known that he had a possible cause of action for malpractice when he was hospitalized in January 2011. The majority points to the fact that Dr. Mishra did not inform plaintiff that he had kidney disease and that plaintiff did not have access to his records or lab reports. The majority reasons that plaintiff did not know he had a previous history of kidney disease and was unaware that his kidney disease was a slowly progressing condition, rather than an acute incident.

I disagree with the majority's conclusion that the fact that plaintiff was unaware that he had a progressive kidney disease demonstrates that he should not have known of a possible cause of action. First, the majority relies on evidence outside of the record in concluding that kidney failure can occur quickly and has several causes. The majority conducted its own research regarding the pathophysiology of kidney failure and failed to limit its review to the medical evidence in the record. The parties did not discuss the causes or progression of kidney failure in their briefs on appeal, and the majority's discussion of the pathophysiology of kidney disease contains medical conclusions that require expert testimony and that are outside the expertise of the majority. Second, contrary to the majority's conclusion, plaintiff knew that he had elevated kidney test levels. He also knew that Dr. Mishra performed an ultrasound test on his kidneys, which would have alerted a reasonable person to the fact that there may be an issue with his or her kidneys. In spite of plaintiff's elevated kidney levels and the ultrasound test, Dr. Mishra informed plaintiff that his kidneys were fine and that there was nothing to worry about. Plaintiff should have known he had a possible cause of action when he learned that he had kidney disease, in spite of Dr. Mishra's statements to the contrary. Plaintiff's kidney failure was not a sudden event disconnected to his previous medical diagnoses and treatment. Instead, plaintiff was aware of the fact that Dr. Mishra was monitoring his kidneys and that he had elevated kidney levels, and he knew that Dr. Mishra performed an ultrasound test specifically to ensure that there was no issue with his kidneys. Therefore, plaintiff should have known of a possible cause of action when he learned that he had kidney failure on January 3, 2011.

The majority also reasons that a reasonable, ordinary person would not understand the medical terminology or the pathophysiology connected with kidney diseases. However, plaintiff's understanding of the terminology and physiology of his condition was not necessary in order for him to know of a possible cause of action. Indeed, Dr. Mishra discussed the issue with

plaintiff in terms that plaintiff could understand by informing plaintiff that his "kidney number" was a bit elevated, but informing him that he had nothing to worry about. Plaintiff's deposition testimony reveals that he understood that Dr. Mishra was monitoring his kidneys. Plaintiff was also aware that Dr. Mishra ordered an ultrasound test for his kidneys and that Dr. Mishra concluded that his kidneys were fine after looking at the test. Thus, this was not a situation in which plaintiff was presented with information that he could not understand. Instead, plaintiff was aware that Dr. Mishra was monitoring his kidneys for a potential problem, but Dr. Mishra reassured him that there was no issue.

Plaintiff's testimony indicated that he had actual knowledge of the existence of his claim once Dr. Tayeb informed him that he could have avoided kidney failure if his physician referred him to a nephrologist earlier. However, the statute requires the court to consider when a plaintiff discovered or *should have* discovered the existence of his claim. Plaintiff should have discovered the existence of a cause of action on January 3, 2011, and he failed to commence the action within six months of this date. Accordingly, I conclude that plaintiff's action was barred by the limitations period in MCL 600.5838a(2), and summary disposition was properly granted pursuant to MCR 2.116(C)(7). Therefore, I would affirm the trial court's order granting summary disposition in favor of defendants.

/s/ Kathleen Jansen

EXHIBIT C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

Kerry Jendrusina

Plaintiff,

Case No. 13-3802-NH

vs.

Hon. JAMES M. BIERNAT, JR.

Shyam Mishra, M.D.,
Shyam N. Mishra, M.D., P.C.,
Jointly and Severally,

Defendants.

BRIAN J. McKEEN (P34123)
JOHN R. LaPARL, JR. (P39549)
McKEEN & ASSOCIATES, P.C.
Attorneys for Plaintiff
645Griswold Street, Suite 4200
Detroit, Michigan 48226
(313) 961-4400

PLAINTIFF'S COMPLAINT AND DEMAND FOR JURY TRIAL

There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

BRIAN J. McKEEN (P34123)
JOHN R. LaPARL, JR. (P39549)

NOW COMES Plaintiff, Kerry Jendrusina, by and through his attorneys, McKEEN & ASSOCIATES, P.C. and for her Complaint and Demand for Jury Trial, states as follows:

GENERAL ALLEGATIONS

1. The amount in controversy exceeds Twenty-Five Thousand ($25,000.00) Dollars, excluding costs, interest and attorney fees and is otherwise within the jurisdiction of this court.

2. The cause of action arose in the County of Macomb, State of Michigan.

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3. Plaintiff was at all times relevant hereto a resident of the County of Macomb, State of Michigan.

4. At all times relevant hereto, Defendant Shyam Mishra, M.D., was a duly licensed and practicing physician, practicing Internal Medicine, providing medical care in the county of Macomb, State of Michigan, and was an actual and/or ostensible agent, servant and/or employee of Shyam N. Mishra, M.D., P.C.

5. At all times relevant hereto, Defendant Shyam N. Mishra, M.D., P.C., was a licensed and accredited health care institution doing business in the County of Macomb, State of Michigan, and was the master, employer and/or ostensible principle for Defendant Shyam Mishra, M.D., and is thus vicariously liable for their negligent acts and omission.

6. It is alleged that the corporate entities are directly and vicariously liable for the actions and/or inactions of its actual and/or ostensible agents, servants and/or employees.

FACTUAL ALLEGATIONS

7. Kenny Jendrusina has a history of hypertension, dyslipidemia, polycythemia, and eosinophilia.

8. Dr. Shyam Mishra was Mr. Jendrusina's primary care provider for more than 20 years. Over the years, Mr. Jendrusina's renal function slowly began to decline. Dr. Mishra was aware of this and diagnosed Mr. Jendrusina with renal insufficiency in June 2007.

9. Dr. Mishra continued to monitor Mr. Jendrusina's renal function, which continued to worsen. Mr. Jendrusina also developed anemia related to his chronic kidney disease. Please see the table on the following page for reference.

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DATE	Crestinine Reference Range: 0.5 – 1.3 mg/dL	BUN Reference Range: 7 – 25 mg/dL	eGFR Reference Value: > or = 60 mL/min/1.73 m^2	Hgb Reference Range: 13.2 – 17.1 g/dL
4/03/2007	1.2	16	> 60	16.8
6/14/2007	1.5	18	53	15.6
8/12/2008	1.92	25	37	14.1
10/30/2008	2.72	35	25	13.1
12/22/2008	2.74	31	25	12.2
5/12/2009	2.33	24	30	
11/30/2009	2.62	32	26	12.9
2/02/2010	2.28	30	30	13.6
7/27/2010	3.13	36	21	12.6
12/14/2010	4.99	46	12	13.0

10. Despite progressively worsening renal function, there is no indication that Dr. Mishra ever ordered or performed any testing or examination of Mr. Jendrusina's urine.

11. In addition, there is no indication that Dr. Mishra attempted to determine the cause of Mr. Jendrusina's chronic kidney disease. Mr. Jendrusina was never referred to a nephrologist.He was never counseled or educated on the importance of avoiding nephrotoxic medications, blood pressure monitoring, or dietary modifications.

12. Even when Mr. Jendrusina's estimate glomerular filtration rate (eGFR) had decreased to 12 mL/min/1.73 m^2, Dr. Mishra failed to refer him to a nephrologist and did nothing further to treat his condition.

13. On January 3, 2011, Mr. Jendrusina presented to Henry Ford Macomb Hospital complaining of nausea, vomiting, headache, and diarrhea. Laboratory testing revealed that he

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was in acute renal failure. His creatinine level was 20.4 mg/dL, BUN 131 mg/dL, potassium 6.4 mMol/L, and phosphorus 20.7 mg/dL. He also had significant proteinuria.

14. Mr. Jendrusina was started on hemodialysis and remained in the hospital until January 9, 2011.

15. Dr. Mishra allowed Mr. Jendrusina's chronic kidney disease to progress to end-stage renal failure without implementing any appropriate medical treatments to prevent disease progression. Currently, Mr. Jendrusina continues to require hemodialysis treatments multiple times each week.

COUNT I: MEDICAL NEGLIGENCE OF SHYAM MISHRA, M.D.

16. Plaintiff hereby repeats, restates and realleges the allegations contained in paragraphs 1 through 15 of Plaintiff's Complaint as though fully incorporated herein.

17. As to Defendant Shyam Mishra, M.D., as a reasonable and prudent licensed and practicing physician, specializing in Internal Medicine, when presented with a patient such as Kerry Jendrusina, owed a duty to timely and properly:

a) Perform and appreciate a thorough health history and physical examination, and recognize Mr. Jendrusina's history of hypertension, dyslipidemia, polycythemia, and eosinophilia;

b) Heed and appreciate Mr. Jendrusina's signs and/or symptoms, including, but not limited to, edema;

c) Review and appreciate all laboratory results;

d) Determine the stage of Mr. Jendrusina's chronic kidney disease;

e) Consider all causes of chronic kidney disease in the differential diagnosis;

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f) Order and/or perform appropriate diagnostic tests at regular and proper intervals including, but not limited to, urinalysis with urine protein level and sediment examination;

g) Determine the cause of Mr. Jendrusina's kidney disease, and treat the cause if possible.

h) Order appropriate medications for the treatment of Mr. Jendrusina's medical conditions including, but not limited to, hypertension, dyslipidemia, and kidney disease, in order to prevent progression of chronic kidney disease;

i) Educate and counsel Mr. Jendrusina on the management of chronic kidney disease, including, but not limited to, dietary modifications, home blood pressure monitoring, and the avoidance of medications known to impair or affect renal function;

j) Refer the patient to and/or directly consult with an appropriate medical specialist including, but not limited to a nephrologist, whenever the patient's condition indicates that referral or consultation is necessary;

k) Any and all acts of negligence as identified through additional discovery.

18. That the Defendant Shyam Mishra, M.D. did none of these things, and his failure to do so is below the standard of care, and such acts or omissions constitute professional negligence for which this Defendant and any and all other physicians who participated in the care of Kerry Jendrusina are directly liable.

19. Dr. Mishra failed to properly manage and treat Mr. Jendrusina's kidney disease. Dr. Mishra also failed to order appropriate diagnostic tests in order to determine the cause of Mr. Jendrusina's renal failure, failed to order and perform appropriate testing to monitor his renal function, and failed to manage his medical conditions properly in order to prevent progression of chronic kidney disease. In addition, Dr. Mishra failed to educate and counsel Mr. Jendrusina on

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chronic kidney disease and the topics of dietary modification, blood pressure monitoring, and avoidance of certain medications. Furthermore, Dr. Mishra never referred Mr. Jendrusina to a nephrologist for further management of his condition. These failures resulted in the progression of Mr. Jendrusina's kidney disease to renal failure/end-stage renal disease.

20. Within a reasonable degree of medical certainty, the above named health care providers' violations in the standard of care caused Kerry Jendrusina's end-stage renal disease and acute renal failure, and the above named health care providers are thereby responsible for all related *sequelae*.

21. As a further consequence of the above named health care providers' negligence, Kerry Jendrusina suffered various medical, prescriptive, psychological, nursing and hospital expenses, loss of wages and wage earning capacity, pain, suffering, emotional distress, humiliation, fright, depression, loss of enjoyment of life, and other damages, all of which are past, present, and future. Mr. Jendrusina further claims all elements of damages permitted under Michigan's statutory and common law, whether known now or whether becoming known during the pendency of this case.

22. Dr. Mishra's failure to comply with the respective standard of care created a foreseeable risk of injury to Kerry Jendrusina. But for the failures of Dr. Mishra to comply with his respective standards of care, Mr. Jendrusina's injuries and damages would have been prevented.

WHEREFORE, Plaintiff hereby requests an award of damages against the Defendants herein, jointly and severally, in whatever amount above Twenty-Five Thousand ($25,000.00) dollars that Plaintiff is found to be entitled to, together with costs, interest and attorneys fees, as well as all other damages allowed under Michigan Law.

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COUNT II: MEDICAL NEGLIGENCE OF SHYAM N. MISHRA, M.D., P.C.

23. Plaintiff hereby repeats, restates and realleges the allegations contained in paragraphs 1 through 23 of Plaintiff's Complaint as though fully incorporated herein.

24. As to Defendant Shyam N. Mishra, M.D., P.C., an accredited and licensed health care institution, via its agents, actual and/or ostensible, servants and/or employees including, but not limited to, Shyam Mishra, M.D., which holds itself out to the public and their patients as being competent of rendering medical services, when presented with a patient such as Kerry Jendrusina, owed a duty to timely and properly:

a) Select, train, and monitor its employees, servants, agents, actual or ostensible, or its staff of physicians, to ensure that they are competent to perform optimum medical and/or surgical care and comply with the standard of care as described herein;

b) Provide qualified medical staff with the proper training and ability to meet Kerry Jendrusina's needs, including the ability to safely and properly treat a patient with kidney disease;

c) Ensure that appropriate policies and procedures are adopted and followed including, but not limited to, the safe and proper treatment of a patient with kidney disease;

d) Any additional acts of negligence identified through the discovery process;

25. That the Defendant, Shyam N. Mishra, M.D., P.C. by and through its agents, actual and/or ostensible, servants, and/or employees, including, but not limited to, Shyam Mishra, M.D., did none of these things and its failure to do so is below the standard of care and such acts or omissions constitute professional negligence for which this Defendant is directly liable to Plaintiff.

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26. Defendant Shyam N. Mishra, M.D., P.C. is both directly and vicariously liable for the actions and/or inactions of any of its agents, whether actual, implied, apparent and/or ostensible, employees, and/or its staff, including, but not limited to, Shyam Mishra, M.D.

27. Dr. Mishra failed to properly manage and treat Mr. Jendrusina's kidney disease. Dr. Mishra also failed to order appropriate diagnostic tests in order to determine the cause of Mr. Jendrusina's renal failure, failed to order and perform appropriate testing to monitor his renal function, and failed to manage his medical conditions properly in order to prevent progression of chronic kidney disease. In addition, Dr. Mishra failed to educate and counsel Mr. Jendrusina on chronic kidney disease and the topics of dietary modification, blood pressure monitoring, and avoidance of certain medications. Furthermore, Dr. Mishra never referred Mr. Jendrusina to a nephrologist for further management of his condition. These failures resulted in the progression of Mr. Jendrusina's kidney disease to renal failure/end-stage renal disease.

28. Within a reasonable degree of medical certainty, the above named health care providers' violations in the standard of care caused Kerry Jendrusina's end-stage renal disease and acute renal failure, and the above named health care providers are thereby responsible for all related *sequelae*.

29. As a further consequence of the above named health care providers' negligence, Kerry Jendrusina suffered various medical, prescriptive, psychological, nursing and hospital expenses, loss of wages and wage earning capacity, pain, suffering, emotional distress, humiliation, fright, depression, loss of enjoyment of life, and other damages, all of which are past, present, and future. Mr. Jendrusina further claims all elements of damages permitted under Michigan's statutory and common law, whether known now or whether becoming known during the pendency of this case.

30. Dr. Mishra's failure to comply with the respective standard of care created a foreseeable risk of injury to Kerry Jendrusina. But for the failures of Dr. Mishra to comply with

his respective standards of care, Mr. Jendrusina's injuries and damages would have been prevented.

WHEREFORE, Plaintiff hereby requests an award of damages against the Defendants herein, jointly and severally, in whatever amount above Twenty-Five Thousand ($25,000.00) dollars that Plaintiff is found to be entitled to, together with costs, interest and attorneys fees, as well as all other damages allowed under Michigan Law.

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

BRIAN J. MCKEEN (P34123)
JOHN R. LaPARL, JR. (P39549)
Attorneys for Plaintiff
645 Griswold Street, Suite 4200
Detroit, MI 48226
(313) 961-4400

DATED: September 16, 2013

McKeen & Associates, P.C. ◆ 645 Griswold Street, Suite 4200 ◆ Detroit, MI 48226 ◆ (313) 961-4400

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

Kerry Jendrusina

Plaintiff,

vs.

Shyam Mishra, M.D.,
Shyam N. Mishra, M.D., P.C.,
Jointly and Severally,

Defendants.

Case No. 13-3802-NH

Hon. JAMES M. BIERNAT, JR.

BRIAN J. McKEEN (P34123)
JOHN R. LaPARL, JR. (P39549)
McKEEN & ASSOCIATES, P.C.
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Detroit, Michigan 48226
(313) 961-4400

PLAINTIFF'S JURY DEMAND

NOW COMES Plaintiff, Kerry Jendrusina, by and through his attorneys, McKEEN & ASSOCIATES, P.C. and hereby demands a trial by jury in the above entitled cause of action.

Respectfully Submitted:

McKEEN & ASSOCIATES, P.C.

BRIAN J. MCKEEN (P34123)
JOHN R. LaPARL, JR. (P39549)
Attorneys for Plaintiff
645 Griswold Street, Suite 4200
Detroit, MI 48226
(313) 961-4400

DATED: September 16, 2013

EXHIBIT D

JENDRUSINA v. MISHRA, M.D., ET AL.

KERRY JENDRUSINA

May 29, 2014

Prepared for you by

BIENENSTOCK
NATIONWIDE COURT REPORTING & VIDEO

Bingham Farms/Southfield • Grand Rapids
Ann Arbor • Detroit • Flint • Jackson • Lansing • Mt. Clemens • Saginaw

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

KERRY JENDRUSINA,
Plaintiff,
vs. Case No. 13-3802-NH
Hon. James Biernat, Jr.
SHYAM MISHRA, M.D.,
SHYAM N. MISHRA, M.D., P.C.,
Jointly and Severally,
Defendants.

The Deposition of KERRY JENDRUSINA,
Taken at 645 Griswold, 13th Floor, Conference Room 2,
Detroit, Michigan,
Commencing at 3:09 p.m.,
Thursday, May 29th, 2014,
Before Joanne Smith, CSR-3099.

APPEARANCES:

MARCO C. MASCIULLI
McKeen & Associates, PC
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Detroit, Michigan 48226
313.961.4400
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Appearing on behalf of the Plaintiff.

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Appearing on behalf of the Defendants.

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EXHIBITS

EXHIBIT Page
(No Exhibits Offered.)

Detroit, Michigan
Thursday, May 29th, 2014
3:09 p.m.

KERRY JENDRUSINA,
was thereupon called as a witness herein, and after having first been duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. DWAIHY:

Q. Would you please state your full name for the record?

A. Kerry Gerard Jendrusina.

Q. And your date of birth and your age, please.

A. February 9th, 1958. I am 56 years old.

MR. DWAIHY: Okay. Please let the record reflect that this is the date and time set for the deposition of Mr. Jendrusina -- Did I say that correct?

A. Jendrusina.

MR. DWAIHY: Thank you. -- scheduled pursuant to notice and agreement of the parties to be used for all purposes under the applicable rules of court in Michigan.

BY MR. DWAIHY:

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Q. Sir, have you ever had your deposition taken before today?
A. A deposition on this case?
Q. At any time.
A. There was one work-related one with the Labor Board I just did over the phone.
Q. Okay. When was that? Roughly. I don't need an exact date. Years ago?
A. 1980s.
Q. Wow.
A. Long time ago.
Q. Before we get started, let me just review a couple basic ground rules with you, if I could. As you can see, we have a court reporter here with us today. She's transcribing everything we say and, for that reason, it's important that we both try to talk one at a time. If we're both talking at the same time, she can't record it. Okay?
A. Okay.
Q. For the same reason, when I ask you questions today, it's important that you answer verbally. If you just nod your head, for instance, and don't say anything, or shrug your shoulders, for example, she won't be able to record that.
A. Okay.

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Q I might remind you of that from time to time. I'm not trying to be pushy or rude. It's just so we make a good transcript; okay?
A. Okay.
Q. Also very important, I'm going to ask you questions today about your medical history, about your treatment with my client, Dr. Mishra, things of that nature among others. If you don't know the answer to one of my questions or you just don't remember because it was years ago, or for whatever reason, just tell me you don't remember. I don't want you guessing about anything; okay?
A. Uh-huh.
Q. Also, if you do answer one of my questions, I'll assume that you understood what I was asking you and move on to the next question. Is that fair?
A. Repeat, please.
Q. Sure. If you do answer one of my questions --
A. Yes.
Q -- I'll assume you understood what I was asking and I'll move on to the next question; is that fair?
A. Okay.
Q If you don't understand my question, I should tell you please tell me and I'll try to rephrase it so it's understandable; okay?

Page 7

A. Okay.
Q Thank you. Have you ever filed a lawsuit other than this one?
A. No.
Q. Okay. You and your attorneys have provided Answers to Interrogatories. Does that term mean anything to you, basically written questions that we submit to you and you provide answers to? Do you recall doing that?
A. Yes, I do.
Q. Okay. I reviewed some of those so I have some of your information here. Let me review some basic background information with you. Tell me if I have it correct; okay?
A. Okay.
Q. You are married to Diane; is that correct?
A. Yes.
Q. You've been married since 1992?
A. Yes.
Q. You have three children together; is that correct?
A. Three together and two step.
Q. Okay. I was going to ask you, have you been married before?
A. No.
Q Okay. But your wife Diane has?
A. Yes.

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Q. Okay. And she has two children from another marriage?
A. Yes.
Q. Okay. What are their names and ages, please?
A. Brian, he will be 30 this year. He'll be 30 this year. And Kelly, which, eight and 12 when we got married, four years difference, so she'll be 34 this year.
Q. Do your two stepchildren live with you?
A. No, they've moved out.
Q. When did they move out of the home?
A. I think after my stepdaughter did her first two years at Macomb and then went a way to Central. She never moved back in. And then my stepson moved out -- Geez. I don't remember. It was like after he graduated from college. They got a house -- My stepdaughter got a house and my future son-in-law went to Iraq so my stepson moved in with my stepdaughter type of thing.
Q Okay. Let me ask you this: You've got a stepson and a stepdaughter; correct?
A. Yes.
Q. They both moved out roughly five years ago maybe? I'm just trying to estimate based on their ages.
A. Stepdaughter, probably more like ten years.
Q. Oh, okay.

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A. And stepson was probably, oh, I'd say within the last -- I don't know. Within eight years, seven years, six years. I'm not sure.
Q. Fair enough.
A. It's very -- I'd have to check with the wife. I don't remember.
Q. That's fair enough. I'm just trying to get a general idea.
A. I supported my stepson until he graduated, basically. As long as he was a full-time student, I let him stay, free room and board. After he graduated I started charging him room and board. He had to be about 23, 24 before he moved out.
Q. Your three children, do they still live with you?
A. Yes.
Q. And they've lived with you since birth?
A. Yes.
Q. And you have no other children?
A. No.
Q. You're a high school graduate; correct?
A. Yes.
Q. And you have an Associate's degree, Associate's of Science degree in electronic engineering technology; is that correct?
A. Correct.

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Q. You obtained attained that in 1982?
A. Yes.
Q. Macomb Community?
A. Yes.
Q. Any education beyond that, formal education?
A. No, just a few questions past that. Was supposed to go towards eventual degree from Wayne State but only another semester. That's as far as I went.
Q. You don't have any medical background or nursing background or anything like that?
A. No.
Q. Does your wife have any medical or nursing background?
A. No.
Q. Any of your children?
A. My son is now a pharmacy tech.
Q. Okay.
A. And he's going -- went to Macomb for his gen ed, now he's going to transfer to Oakland to get a pre-med degree and he's considering going into pharmacy, but no, no one with any medical knowledge.
Q. How long has he been a pharmacy tech, just out of curiosity?
A. A little over a year, year and a half, something like that.
Q. Are you employed presently?

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A. I'm self-employed.
Q. How long have you been self-employed?
A. February of '99 I started my corporation.
Q. Okay. Name of your corporation?
A. K&D Engineering, Incorporated.
Q. And what do you do? Just explain to me.
A. I'm an industrial controls engineer. I design electrical and pneumatic.
Q. If you had to explain that to a lawyer; how would you explain it?
A. Know when the robots go and make the cars?
Q. Yeah.
A. Put the engine -- put the engine block in at the end, it comes a full functioning engine. Basically I do the automation that build engines and other, builds engines and cars, software, electricai, hydraulic. Software did I say already? Software.
Q. And you had your own company since February of 1999?
A. Yes, is when I incorporated, yes.
Q. And prior to that, who were you employed by?
A. ABB.
Q. Okay. Same type of job?
A. Yes, exact same job, yes.
Q. How long did you work there, roughly?
A. '92 to '98. About six years.

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Q. Okay. Where are they located?
A. Auburn Hills.
Q. Prior to that job, prior to '92, if you recall?
A. Sandy Machine Tool in Rochester.
Q. How long?
A. About six months. Because before that I was with Comal Productivity Systems, Fiat-owned company, all automation companies. They basically stopped U.S. operations and were going to ship everything over to Italy to be built, and I was just married in '92 and it was not a good time to go to Italy for six months out of the year without the wife.
Q. I understand.
A. I took the bailout or money and went to Sandy for the time being. I heard about ABB. ABB contracted me for six months and hired me in.
Q. Okay. Let's get back to your present self-employment. Since 1999 has that been run out of your home?
A. Yes.
Q. Other employees besides yourself?
A. One. One real employee, full employee I had for a year about 2008.
Q. Okay.
A. And laid him off in December of 2008.

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Q. Okay.
A. **And then I've had 1099 employees on and off doing small jobs, CAD work mostly.**
Q. Who was the employee that worked for you in 2008?
A. **Dan Flynn.**
Q. And why did you lay him off, just out of curiosity?
A. **No work. The project stopped.**
Q. Do you presently work full time?
A. **When I can get the work in town.**
Q. Okay. And in your Answers to Interrogatories, these are rough figures, but for the past I think five years you listed income from your company fluctuating between approximately 54,000 and 59,000 annually. Does that sound about right?
A. **Yes. Is that income plus profit on that?**
Q. I don't know how you answered. Maybe I should look at it again.
So, for example, in 2011 it says wages $36,000 plus $18,957 distribution to owner equals $54,957?
A. **Yes.**
Q. Okay. So from your company, for example, in 2011, is that your net income, or your gross income, about $55,000?
A. **Yes.**

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Q. Okay. Does your wife work for your company?
A. **No.**
Q. Okay. Does your wife work?
A. **Yes.**
Q. What does she do?
A. **She's a prep cook for Salsaria restaurant in Troy.**
Q. And how long has she worked there?
A. **It's two years now.**
Q. And do you know, what is her income roughly, annually?
A. **Thirteen.**
Q. 13,000?
A. **Yeah.**
Q. Okay. Does she work full time?
A. **No.**
Q. Okay. Part time?
A. **Yes.**
Q. A couple days a week?
A. **No, she works four or five days. They put her on four days, put her back to five days a week, but she doesn't work eight hours days usually. Five, six, seven hour days. Some eight hour days but rarely eight.**
Q. Fair enough. And then I think you said she has worked there for a couple years; is that right?
A. **Yeah, basically she took the job because I couldn't --**

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My business has a lot of travel. With dialysis now it's very hard to travel.
Q. Okay.
A. **I'm having trouble right now. I'm out of work. Last time I worked was first week in May, second week in May. I have to check my records. Called my main customer, ABB, and they only had out of state work, and that project was Lima, Ohio for Ford, and I tried to set something up there and that's where it was, fifty miles one way to the clinic and fifty miles back. When I go in the field I try to work ten hour days but since this happened it's hard to work more than five, six hours a day. It's exhausting. The fatigue.**
Q Since about what time are you saying it's been hard to work more than five or six hours a day?
A. **Since they failed, but I've been -- The first year in 2011, when I made the money, I have a very good friend who is the boss, manager over there, and he knew I was sick and almost died. He set me up on a job for afternoons. It was for the new -- It was RDU, for Ford Sterling, but anyways, he put me on at nights to watch the contractors. Being an ex-employee, he trusted me, so I was there to watch the contractors, and if they had any trouble with robots or anything**

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like that, I was there, but basically what he let me do was sit in a cube and chill and make money.
Q. Okay.
A. **If I didn't have that, I wouldn't have been working until the middle to the end of the year otherwise. I had a cane I walked with.**
Q. Okay.
A. **So I kind of just sat in the cube and walked once in a while without the cane and had them call me when they had issues.**
Q Okay.
A. **So that year I was -- The guy's been an angel to me. That's the only reason I've gotten work. This guy's a saint to me.**
Q. His name?
A. **Dave Hamby.**
Q And he's employed by?
A. **He's ABB. He's the controls manager there.**
Q Do you still have that arrangement with him now?
A. **Yeah. He still gives me work when he can. Now he told me -- I just talked to him a week ago -- and he has nothing in town for me.**
Q. Let me back up. It's a follow-up question so I make sure I understand you. You said you haven't been able to work more than five or six hours a day since your

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kidneys failed.

A. No, I have, but I'm saying this year I've only worked, five, six hour days on this one project I was working on. I find myself very exhausted afterwards. Because of the walk, the environment I was in and stuff like that. I basically come home, pass out on the couch. My wife woke me up for dinner if she could. Sometimes she couldn't. And then I had dialysis. It's just the fatigue from it.

Q. Tell me about -- When you go to work and you're doing a job, what are you doing? Are there physical demands?

A. I walk and I stand on my feet most of the day. This last job was for heat treatment, pinion gears for differentials for all the Ford products. It was by the heat treat ovens, which is a very hot environment full of carbon in the air and stuff like that, so I had to stand and luckily it was mostly through the winter when I was there and in May it was starting to get very hot so they just sat me -- I had a hard time walking out of there, tell you the truth, my legs were aching so bad and stuff like that.

Q. When you're at a job like that, for example, what are you doing when you're walking and standing? Are you interactin with --

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A. I'm watching robots, talking to the operators, see their issues, watch the HMIs, which is the screens that they actually control things with. Watch the robots picking up something, throw something, trying to kill somebody. I'm on the keyboard, on a computer, watching the logic in the software, make sure it's sequencing properly, make sure everything's correct.

Q. Okay. You also said you had to travel quite frequently for work?

A. If I want to make the money I used to make, I have to travel.

Q. Okay. How often do you travel?

A. Right now I'd be in Ohio. Last year I was in Ohio probably three to four months easily, and I lost that contract, I couldn't get that contract, and another boss says, "Can you go down to Lima?" I said, "No, I couldn't." I didn't have anything set up for dialysis. I could go to that one. I called up a week ago, I said, "Do you have anything in town?" He said, "no, all I've got is out of state." He didn't say Ohio. I know the Lima one is still going on, but all he's got is out of state.

Q. When you would travel, would you go out of town for two or three months at a time?

A. It's usually two weeks at a time, coming over every other weekend.

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Q. You're saying it's more difficult to travel because you need to coordinate your travel near a facility that has dialysis available for you?

A. Yes.

Q. And to get to your dialysis?

A. I'm on home dialysis, too, which is another thing.

Q. Right. I will ask you about that. I think you said at one point you were walking with a cane?

A. Yes, geez, for six months or so.

Q. When was that?

A. I was 260 pounds. I was about 40 pounds overweight. I was on oxygen 24/7. Without oxygen I was down to like 86 percent saturation only, and it was the first few months I had to walk with a cane.

Q. When was this?

A. January, February. Definitely January, February of 2011. March is when I got to go to ABB and I used the cane on and off probably come March.

Q. This is after you were admitted for acute renal failure to Henry Ford Hospital January of 2011?

A. Yes.

Q. Okay. And you stopped using the cane after about six months you said?

A. It's still in my car. No. My legs still ache.

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Q. Okay.

A. And still cramp and stuff like that. So if I'm having a long day at work, my legs do start to ache, then I have my cane, but I try not to use it for any customer because they frown on having, being in an automotive plant with a cane.

Q. Roughly, how often do you think you use your cane now? How many times a week, for example?

A. I try to avoid it. As long as I don't fall down, I don't usually use it. It's there in case I fall down.

Q. Okay.

A. Basically. Sometimes I bounce off my car walking in, or bounce off a wall, but I usually try to catch myself.

Q. When is the last time you've used it, if you recall?

A. Don't recall.

Q. Okay. Months ago?

A. Yeah, I'd say months. Probably last year.

Q. Okay. Thank you for telling me about your current employment. I'm trying to get an Idea as to whether you're claiming lost wages in this case. Your Answers to Interrogatories didn't really specify one way or the other, so from your perspective, have you lost any income or the ability to earn income as a result of your claim in this case, if you understand that?

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A. I guess -- Let me explain what I think you're saying.
Q Sure.
A. Basically my job travel is very prevalent, we do a lot of traveling. It's the nature of the job. Not all the automotive companies are in the Detroit area. So, yes, I'd say a lot of my travel, I've done a lot of work in Cleveland, Lima, not Lima, Sharonville. I've been to Oklahoma City, I've been to Buffalo, New York, I've been to Atlanta, Georgia, I've been to St. Louis. Yes. It depends where the big projects are. I have to travel to make the money. So a lot of times now that's basically not possible to travel too easily.
Q. Because of the dialysis situation?
A. Yeah, because I'm on home dialysis.
Q. Okay.
A. I'm on home dialysis.
Q. Aside and apart from the dialysis situation, is work, just based on the economy or other factors, more hard to come by now?
A. No, there's work out there but it's out of state. I could get work tomorrow if I could travel.
Q. So you can go out of state; you just need to coordinate it with a dialysis center? Is that the bottom line?

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A. Again, it's home dialysis. I stick my own needles.
Q. You're on home dialysis now?
A. Yes.
Q. I'm going ask you about that.
A. Yes.
Q. But does that preclude you from going out of state and making --
A. I can't do home dialysis by myself. I need a trained assistant. That's either my wife or my son are trained with me, to help me, assist me.
Q. Understood. If you wanted to, for example, if you got a call tomorrow, "I've got this job in Ohio" or Atlanta, if you had enough lead time, could you arrange for dialysis when you were out of town?
A. Not home dialysis, probably not.
Q. But could you do it at a facility?
A. I couldn't do it at a facility unless it was DaVita. It's affiliated with my home dialysis.
Q. That's what I'm trying to ask you. Is it possible, if you get a job out of town, if there's a center available nearby, that you do the dialysis while you're out of town for a couple weeks at a time?
A. When I travel, it's expected me to work ten, 12 hour days, and I just don't see how I can do that anymore, even if I did have a clinic in town that I was doing

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the dialysis there.
Q. Okay.
A. Because you're talking about dialysis, in clinic is three and a half to three and three-quarters hours. Three to four times a week at three hours. So I do it before I go to sleep and I basically sleep off the effects of it. There's cramping, restless legs, the hissing in my ears. If I can get to sleep I'm happy, so it's time consuming. It's probably, the whole process, is four hours a night.
Q. Why don't we talk about it right now since we're on the topic? When did you start doing dialysis?
A. Regular dialysis?
Q. Right.
A. Was January 3rd of 2011 when I was in critical care, ICU. ICU critical care.
Q Okay. Did you start doing some form of dialysis before that because you said regular dialysis?
A. That was regular dialysis. Basically what happened, I went in for the flu, they took the blood work, and then all hell broke loose. Next I find myself in ICU critical care with a surgeon with a scalpel cutting my leg open and me saying, "What the heck happened?"
Q. This is January 2011?
A. January 3rd, 2011.

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Q. At Henry Ford Hospital?
A. Henry Ford Hospital.
Q. After that hospital admission, that's when you started the regular dialysis?
A. I was out of there by the following Sunday and that Monday I was at -- I was TTS. That Tuesday I had dialysis at DaVita Clinic on regular dialysis.
Q. When did you start home dialysis?
A. First of all, they do a permacath which, they cut your chest, drop it down your jugular into your heart. That's how they get you on dialysis after they do emergency dialysis. So I was in clinic for that.
Q. Dr. Rizk, R-i-z-k, did that?
A. Rizk did that and Rizk also did my fistula, which is my access now.
Q. That's on your left forearm?
A. My left arm. See it. It's all the way down here. He took an artery supplying blood to these two fingers and rerouted it to a vein. The vein is gorged now, swelled up. You can see it.
Q Is that the only fistula you've had, on your left arm?
A. Yes. So after that I had to have -- I don't know if they could have done it with that, but they decided when I was getting stronger and stuff, it's possible -- they talked to me about it, so I don't know if I

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entered in September or October of 2011, I did enter in the training, which is like a 30-day training session.

Q. For home dialysis?

A. For home dialysis.

Q. And in September, October 2011 I think I saw in the records is roughly when you started the home dialysis?

A. At the clinic. At home, I believe it was November. November I finally got home, dialysis at home.

Q And how often are you currently doing dialysis at home?

A. Three to four days a week.

Q And how long do they take, each session?

A. Actual sitting there with the needles in?

Q. Right.

A. About three hours, three hours and 15 minutes, because it's actually a total of almost three hours. The machine goes through a lot of tests during that time that doesn't count towards that time. It comes out to three, three and a quarter hours.

Q. How long does the whole process take, the prep and --

A. Priming, setting up the table, cleaning everything, oh, it's probably a good hour before, half hour and then after it takes half hour at least to another hour to stop the bleeding, cleaning up, everything like

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that, so you're talking five hours probably, approximately a night.

Q. And I think you told me you said you needed someone to assist you to do it?

A. Yes.

Q. And is that typically your wife?

A. My wife is trained and my son was trained. They came to training with me.

Q. Which son?

A. My 21-year-old.

Q And his name, sir?

A. Andrew.

Q. You cannot do it by yourself; you need someone to assist you?

A. Yes. I can't take down the needles and stuff like that. I have to stick the needle, flip it and hold it there while they put the tape. Need a hand to stick the tape to hold the butterfly needle there.

Q You have Blue Cross-Blue Shield health insurance; is that correct?

A. No, I'm on Medicare.

Q Medicare. Did at one time you have Blue Cross-Blue Shield?

A. Yes, when this happened I had Blue Cross-Blue Shield.

Q. Okay.

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A. I have a Blue Cross-Blue Shield supplemental now and Blue Cross-Blue Shield prescription D plan.

Q. Okay. How long have you had -- You said when this happened you had Blue Cross-Blue Shield. Talking about January 2011?

A. Yes.

Q How long had you had it up until that point?

A. The Blue Cross?

Q. Yes.

A. That was my first insurance I got back in February of '99, once I started my own corporation after the COBRA was done with.

Q How long have you been on Medicare?

A. They forced me on Medicare. It was only 30 months I could stay on, Blue Cross was responsible. I think it was October of 2013 I had to go on Medicare. I was forced to.

Q. Okay. And your Answers to Interrogatories said -- I thought it said Blue Cross-Blue Shield so far has paid all of your medical expenses; is that correct?

A. Yes.

Q. Okay. So you obviously have a dialysis machine in your home?

A. Yes.

Q How big is it?

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A. Want to see a picture?

Q. Sure.

A. This happens. This kind of stuff happens sometimes, too.

Q. What is that?

A. Bleeding got out of control.

Q. You're showing me a picture on your phone of --

A. Yeah, just took a picture.

Q. -- blood coming out --

MR. MASCIULLI: Do we want him to e-mail these pictures to attach as exhibits?

BY MR. DWAIHY:

Q. I was going to ask you about that because your Answers to Interrogatories reference some photographs your son had taken.

A. Yes, I'm looking for those. That just happened the other night when I popped, put too much pressure on venous and arterial needle was still on there. Started bleeding out. I had to get my wife to sleep on the couch. She has to work in the morning. She sleeps on the couch in case there's a problem. I have an old school bell to ring to wake her up to assist me. There's a picture of me on dialysis.

Q. Okay. So that's a picture of you at your home?

A. In my living room.

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Q. In your living room, and that's the dialysis machine?
A. Yes.
Q. How many pictures -- We requested any photographs relative to this case. Can you tell me about how many pictures either you've taken or your son has taken for purposes of this case?
A. Not for this case. Pictures in general.
Q. Okay.
A. If you want it, I'll videotape the process. I don't have a problem with that either.
MR. MASCIULLI: Paul do we want the pictures you referenced to be sent, just to be attached as exhibits?
MR. DWAIHY: Sure, you can e-mail them to me. I just want any and all photographs.
A. These are the needles. See the butterfly on them. That has to be taped down. I have to stick it until it pops, flip it. Stick it. Pull out the butterfly and put tape to hold it in place. These are extremely sharp needles. They're 15 gauge needles. Cut right through. Like hot butter. Like a knife going through hot butter. That sharp. I've got to hold onto the needle.
MR. DWAIHY: Let me say something before I ask you any more questions. Marco, I think either in

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our Interrogatories or our Request to Produce we requested photographs you intend to use in this case or for purposes of this case. I'm not sure whether we've received those yet.
MR. MASCIULLI: Okay.
MR. DWAIHY: I haven't seen them.
MR. MASCIULLI: Okay.
MR. DWAIHY: If you wouldn't mind making a note and just getting those to us, e-mail, in color, that would be great.
MR. MASCIULLI: Excellent. I'll do that.
MR. DWAIHY: I'd appreciate that.
A. I stated my son took pictures, I take pictures and obviously they are available.
BY MR. DWAIHY:
Q. Okay. We can get those from your attorney.
A. Do you want a video?
Q. We can talk about that later. The Blue Cross-Blue Shield covered your dialysis machine also?
A. Yes, up to last October, yes.
Q. And then what covers it, Medicare?
A. Medicare took it over.
Q. Okay. So all medical expenses related to your kidney issues have been covered by either Blue Cross-Blue Shield or Medicare?

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A. Except the extras that came out of pocket. That they did not cover.
Q. Tell me about what the extras are.
A. Wife has records of all of it. Oxygen and such like that. Oxygen wasn't covered by -- I don't know. She keeps all the books and keeps all the records, so she can give you a detailed list of everything. She has all the receipts and everything on everything that was spent. But Detroit Oxygen, they didn't pay for oxygen, so that was one of the big --
Q How long have you been on oxygen?
A. I was on oxygen.
Q. Okay. From what time to what time?
A. I say January, February, I believe. Sometime in March I got off of it.
Q. Of what year?
A. 2011.
Q. Okay. So first quarter of 2011?
A. Yes.
Q. Any other out-of-pocket expenses besides oxygen?
A. I did that in the questions and wife has that all organized. She's extremely organized. She has detailed lists and receipts on everything. If you need that, I can get copies and forward it to you.
Q. Fair enough. Thank you. I want to follow up on a

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couple matters with respect to your dialysis. You said either your wife or one of your sons?
A. My son.
Q. I'm sorry, you have two daughters and one son.
A. Two sons. A stepson.
Q. Your son and your wife assist you with the dialysis. What exactly do they do when they're assisting you that you can't do?
A. It's easy to explain on tape. First of all, I got to prep the area. I put a tourniquet on. I have to pull the tourniquet this way. Then she takes plastic forceps and locks the tourniquet in place on the fistula enough to stick the needle. Then I stick my needle until I get the pulsating blood. I flip it, turn it, open up the butterfly there and hold it in place while she puts tape. I cannot let that thing go. It can go right through the wall of the fistula and there'd be infiltration. If infiltration happens, if it's bad enough, I end up in the hospital, my neck cut open, my chest cut open and permacath put back in. So it's very important to hold on to that needle.
Q. Has that ever happened?
A. I had one infiltration. But as long as I went to the clinic -- infiltration happened up here so they're

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able to stick lower, but they wouldn't let me stick for a month, and then it took about another month for me to get enough confidence to do it myself again.

Q. This is after you were already on home dialysis?

A. Yes.

Q. What treatment did you need for infiltration?

A. Just healing time. I spent the night in the hospital, though.

Q. Okay.

A. 'Cause it did swell up. It was bursting.

Q. Okay. So you were telling me what your wife or your son does to assist you with what you can't do in terms of the dialysis process.

A. And if I need extra supplies, gauze, sponges, if I'm bleeding -- the other night I had to wake her up, I was holding this one down, and the needle was still in it, and this one, the blood started squirting out, I had to have her hold this one while I did this one and give me supplies so I could get it under control. The blood squirts. It's arterial pressure.

Q. You also mentioned some effects of dialysis like fatigue. Tell me -- can you tell me those again, please, so I understand?

A. Fatigue, depression. My legs ache, restless leg, hissing in my ears afterwards, trying to sleep. I

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can't sleep half the time. Even with Xanax and stuff like that.

Q. Okay. Do you take any sleep medications?

A. I'm on Xanax, just to deal with the depression and anxiety of the situation.

Q. Who prescribes the Xanax?

A. Dr. Tayeb.

Q. The nephrologist?

A. Yes.

Q. You mentioned depression. Have you seen a psychiatrist?

A. No. I see a sociologist every month.

Q. A sociologist?

A. A social worker, I'm sorry.

Q. That's okay.

A. My daughter's going for sociology. A social worker.

Q. What's the worker's name?

A. It was Carrie LeGrand but now it's gone back to Lisa. I just found out the last month.

Q. Can you spell Carrie's last name?

A. It should be in that, those -- It should be listed there.

Q. What's Lisa's last name?

A. Don't know. She was in the clinic. I had her for a few months and just found out she's going to be -- In

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the clinic they usually don't give last names, just for they wanted to be anonymous, I guess, I don't know, and they don't want to really get to know you that well because 20 percent of the people in the clinic die each year.

Q. What clinic?

A. DaVita.

Q. And that's where the social workers are located?

A. I go there once a month to exam rooms there to meet with Tayeb, my social worker, my dietician, my technician and my nurse. Once a month they review the blood work. I do my blood at home. I draw my own blood, centrifuge it, send it and ship it. Once a month.

Q. Your nurse is Lynn Dobson, D-o-b-s-o-n?

A. She just quit. Now we have another new one.

Q. What's your new nurse's name?

A. I met her once. I don't remember her name. Linda, Melissa or something like that. She's in training. She hasn't really taken over.

Q. And your social workers' names do not appear to be listed --

A. Carrie LeGrand.

Q. LeGrand?

A. LeGrand, I think it is.

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Q. And then Lisa who?

A. Lisa, I don't know. As I said, she was in clinic.

Q. That's fine. But they're both at DaVita?

A. They're both at DaVita.

Q. What location of DaVita?

A. Clinton.

Q. Clinton Township?

A. Yes.

Q. What street?

A. It's on Nineteen.

Q. Nineteen Mile Road?

A. Yes.

Q. Okay. And aside from the social worker, have you seen a psychiatrist or a psychologist or anything like that?

A. No. I have pretty good coping mechanisms.

Q. Okay.

A. I have a sense of humor and stuff that tries to see me through most days. Even when I was laying in the hospital, not knowing if I was going to get out. Everybody laughed.

Q. Let me back up, if I could, sir. Towards the beginning of the deposition you were telling me about your wife started working at a restaurant about two years ago; is that correct?

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A. Yes.
Q. Can you tell me where she worked prior to that?
A. She had worked at Bill's Suburban on Gratiot in Roseville, as office whatever. Office worker. Ran the officer there. We got married. She got pregnant. She quit work. So she hadn't worked since my son was born in '92.
Q. So from about '92 until about two years ago she had not worked?
A. Right.
Q. Other income besides your wife or you?
A. (Indicating in the negative).
Q. None.
A. I mean, dividend on stock. No, nothing else.
Q. Okay. And you told me about photographs. Did you make a note, notes on your computer or handwritten notes or a diary or anything like that related to this case or related to the treatment in this case?
A. What, these pictures?
Q. No, sometimes in cases like this, people will make handwritten notes or notes on their computer about the treatment they received. Did you do anything like that?
A. Dialysis?
Q. About anything related to this case. Or sometimes

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people will save calendars. Do you have any calendars where you wrote down anything about your treatment or appointments, stuff like that?
A. For dialysis?
Q. For dialysis or any of your care related to this case. I'm not saying you should have that. I'm just asking whether you happen to do it. Sometimes people do it, sometimes people don't.
A. I would have to look.
Q. For example, did you keep a diary about your care?
A. On the dialysis stuff or before?
Q. Yeah.
A. Or anything with this case? No.
Q. Okay.
A. (Indicating in the negative).
Q. Okay. Based on my review of your records, you started treating with Dr. Mishra quite a while ago?
A. Yes.
Q. Late 1980s, 1988; is that correct?
A. Yes.
Q. He was your primary care physician?
A. Yes.
Q. Okay. Let me ask you a couple general questions. Have you ever been a cigarette smoker?
A. Yes.

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Q. When did you start smoking cigarettes?
A. Oh, I don't know. Probably late teens.
Q. How long did you smoke for?
A. I quit September 10th of -- I was 39 years old when I quit, so I quit for -- Last September was 15 years.
Q. Okay. So you haven't smoked cigarettes in 15 years?
A. Not at all.
Q. Okay. Do you have a family history of any kidney problems?
A. No.
Q. Family history of hypertension?
A. Yes. My mother.
Q. Your mother?
A. Yes.
Q. Anyone else?
A. Not that I'm aware of, no.
Q. Fair enough. Family history of any other major medical problems that you're aware of?
A. My mother was diabetic, her mother was diabetic.
Q. Okay.
A. My dad died from lung cancer. He was a Detroit firefighter and he smoked. Bad combination. He died at 58. 29 years ago. Almost 30 years ago.
Q. I'm just going to take you through some of your medical history as I saw it recorded in Dr. Mishra's

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records and ask you some follow-up questions; okay?
A. More water?
Q. Absolutely and you can take a break whenever you'd like?
A. I will just get some water.
(Off the record at 3:50 p.m.)
(Back on the record at 3:52 p.m.)
BY MR. DWAIHY:
Q. Okay. We were starting to get into your, some of your health history. I looked at Dr. Mishra's records. It looks like you started treating with him for hypertension around 2000. Does that sound about right?
A. Sure. I don't remember, but, yeah.
Q. Okay. I mean, that would have been roughly 14 years ago. Does that sound fairly accurate?
A. That sounds about right.
Q. Are you currently on medications for hypertension?
A. Yes.
Q. Okay. Can you tell me what you're on?
A. Carvedilol.
Q Okay.
A. That's it.
Q. That's it? Since 2000 or thereabouts, it's my understanding Dr. Mishra would have prescribed certain

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medications for hypertension. Is that correct?
A. Yes.
Q Okay. From time to time did he change those medications in attempt to control your blood pressure?
A. He added drugs.
Q Okay. Do you recall any of the drugs that you were on?
A. I was on Zestril and then he added a diuretic to that.
Q Okay.
A. When I started having edema. And then he put me on a beta blocker, and I can't remember which beta blocker it was.
Q. Okay. Do you recall about the time you started having edema or swelling?
A. 2008 sometime, I guess.
Q. 2008 you think?
A. Yes.
Q In your legs?
A. Yes.
Q. Anywhere else?
A. Not that I'm aware of, no.
Q. Okay. There was a couple references in the records, sir, that you may not have always taken your medications including your blood pressure medications as directed. Do you deny that?

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A. I don't remember that. Maybe early on, when the blood pressure seemed to go down, because it was fluctuating. Maybe the first year or so. After that, no. I stayed on it.
Q. Okay. Do you recall ever having conversations with Dr. Mishra, for example, where he had to tell you, "You got to make sure you take your medications as I prescribe them," anything like that?
A. Very early on. I would say like in the first year or so.
Q. Okay.
A. I did not know if it was a continuing process at that time or just a temporary -- 'Cause it seemed like, when I had sinus infections and stuff, the blood pressure would go up, and that's where it was first discovered, with a sinus infection.
Q Okay.
A. So I don't know if it was related to a sinus infection. I guess he was unclear on that until he told me I had to be on it and I continued to take it.
Q Okay. Aside from blood pressure medications, you recall having conversations with Dr. Mishra about diet and an attempt to control your blood pressure, dietary changes?
A. Yeah. Yeah.

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Q. What do you remember just in general about that? In terms of what you were supposed to eat, what you weren't supposed to eat.
A. Stay away from salt is basically what I remember.
Q. Were you on any separate medications for cholesterol control?
A. Yes, he put me on Simvastatin, the strongest dose there was.
Q. Did that also start around 2000, to the best of your memory?
A. He tried a couple different meds, as I remember it. I thought it was later on. I don't remember.
Q You recall having conversations throughout the years with Dr. Mishra about weight control, controlling your body weight?
A. Yeah. He said I was overweight and most of my problems and my edema was from the overweight, but I was only maybe 20 pounds over.
Q. Okay. I saw a reference to heart disease and arterial sclerosis back in 1997. Do you recall being diagnosed with that?
A. No.
Q Okay. Do you recall ever being prescribed a statin around that time and refusing to take it?
A. No.

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Q. Okay. You never did not -- To the best of your memory, you never denied taking any medications or telling Dr. Mishra, "I don't want to take this"?
A. No. I trusted him.
Q. Okay.
A. Early on, as I said, I was -- I guess I was -- I guess I thought it was because of the sinus infection. When the sinus infection was done, my blood pressure came down so it wasn't necessary to take it any longer. I wasn't aware I was supposed to stay on it. In the next visit he said, "Are you still on it?" I said, "No, I thought it was during that treatment." And he said, "No, you're on that for good now." I said okay. I did not know that at that time.
Q. When was this?
A. It was early on. Probably back 2000, 2001. But refusing any other drugs? No. 'Cause he gave me steroids and stuff for my sinuses. No, I took everything.
Q. Okay. Have you ever been diagnosed with congestive heart failure that you know of?
A. Not that I know of.
Q. Okay.
A. The one time I was working and my ankles swelled up and I called the office there, because it was my legs

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up to that time. My ankles scared me, thinking it was heart. And his assistant said on the phone, "Well, you better get in here, you might have congestive heart failure. That's a thing to tell the patient to drive to the doctor's office, but I got there and he said, "Your heart was fine." He told me my heart was fine, as I remember, so there was nothing else added to that except maybe the diuretic I think was still there.

Q. Let me ask you about labs. You had your blood drawn for years at Dr. Mishra's direction; correct?

A. He drew it at the office.

Q. That was my question. He withdrew it from you, he or a nurse at his office?

A. He always drew it, yes.

Q. That started about 2000; does that sound about right?

A. As soon as I started going to him.

Q. And what's your understanding as to why they had labs drawn?

A. He's an internist. They take labs to look at your blood makeup see what's going on there. Mostly I thought it was the sinus infection, see if there was an elevated white blood cell count, before he'd give me an antibiotic.

Q. Talking about one sinus infection back in 2000 --

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A. I had them a lot. I don't have them as much as I used to.

Q. How often would you get them?

A. Once, twice a year.

Q. Back in 2000, 2001, 2002?

A. I don't remember. It's probably before I quit smoking.

Q. Okay. I'm also going through my notes of your records. It looks like back in 2000 you started having problems with decreased urine output; do you remember that?

A. 2000?

Q. Right.

A. No.

Q. When do you recall that starting to happen?

A. Probably 2008.

Q. Okay.

A. I don't remember anything early on, no. No, there was nothing.

Q. And when do you recall the swelling in your legs again starting to happen?

A. 2008.

Q. The few last things that we've been talking about, sir, the swelling in your legs, decreased urine output --

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A. I didn't really see that until towards, just before I went in the hospital, to tell you the truth.

Q. Okay.

A. I know I was retaining water but it seemed my urine output was normal.

Q. What was your understanding as to why you were experiencing those symptoms?

A. Edema?

Q. Swelling, decreased urine?

A. As I say, I don't remember decreased urine at all until towards the end.

Q. Towards the end being?

A. January of 2011.

Q. Let's start with edema. What was your understanding as to what was causing your edema?

A. I was told because I was overweight.

Q. By Dr. Mishra?

A. Yes.

Q. Okay. Did you ever have any discussion with him that your kidneys may be causing that?

A. There was test done. He said everything was okay, not to worry about anything on the blood work. He never gave me a copy but I called him or my wife called and he said there was no cause for concern. He said the kidneys was a little bit elevated but not to the point

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where there was anything to worry about, is what he told me.

Q. When was this?

A. About 2008.

Q. Okay. And the decreased urine output -- Did you also have swelling before you went to Henry Ford Hospital, swelling in your legs in January of 2011?

A. You mean just before I went into the hospital?

Q. Right, right.

A. Yeah. Like Christmas Eve, I guess it was, I noticed that I was in pain and I wasn't understanding why. It might have been going on for the last couple -- I don't remember. I don't remember that being that big deal until towards the end.

Q. Toward the end meaning before you went to Henry Ford?

A. Before they went into total failure, yeah.

Q. All right.

A. I remember you guys asked me if I'd get up to urinate during the night. I said, "No, why is that?" He said it's just a sign of diabetes. I said no.

Q. You've been diagnosed as diabetic?

A. Mishra -- Dr. Mishra mentioned that I might be a diabetic because one sugar reading was high, so I did get a glucose monitor and monitored it, watched my diet, never saw it on my glucose monitor. Made sure I

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wasn't putting as much sugar in my coffee in the morning, but it wasn't on a fasting sugar test. Just on a spur of the moment doctor's visit for sinus problems.

Q. I saw you had a discussion with Dr. Mishra about diabetes in November of 2009. Does that sound about right?

A. Yes.

Q. Any other doctor besides him ever diagnose you with diabetes?

A. No. I keep asking my nephrologist if that showed up, and he says no.

Q. Okay. Back to the hypertension, did Dr. Mishra ever have you monitor your blood pressure at home?

A. No. I don't remember him having me monitor it at home.

Q. But when you would come into his office, he'd take your blood pressure?

A. I have white coat hypertension. My blood pressure at home is usually lower. I record it every night, every dialysis night. What, ten times -- every half hour I do it. Every half hour. Six times before, after, standing. So I record it probably about eight, nine, ten times a night, three times, three, fours times a week.

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Q. But you didn't start doing that at home until you started dialysis at home?

A. I did check it at home when I was under his care, yes.

Q. That's what I was getting at.

A. I'm sorry.

Q. That's okay. When did you start doing that?

A. Probably shortly after he said I had it.

Q. 2,000, when he started prescribing the blood pressure medication?

A. After he told me to get back on medication, I needed it. Then I started watching it on and off.

Q. What was your understanding as to the cause of the high blood pressure?

A. He was my mother's doctor, too, so basically hereditary is what I understood it to be.

Q. Did you ever have any discussion with him that your kidney problems or your kidneys may be causing hypertension?

A. Kidney problem causing hypertension?

Q. Yes. Or in any way related.

A. Or hypertension causing kidney problems?

Q. Either one, either way related?

A. No.

Q. No?

A. (Indicating in the negative).

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Q. I think you told me this already. I think it was in 2008 that Dr. Mishra had a discussion with you about your kidney dysfunction?

A. 2000 who?

Q. 2008.

MR. MASCIULLI: I object to form.

A. What's that?

MR. MASCIULLI: Go ahead, answer.

A. I didn't hear what you said.

MR. MASCIULLI: It was just an objection.

BY MR. DWAIHY:

Q. You can answer. Do you remember that? Do you remember the first time he talked to you about having kidney dysfunction?

A. No. All he did was he ordered a test in 2009, I believe it was, did an ultrasound.

Q. Okay.

A. I went to the office early and he had an ultrasound technician come in and the ultrasound, the kidneys, and we got the results back, and it might have been -- my wife might have jotted stuff down when she talked to him, maybe some notes, not necessarily journals, but she said they said, and I verified that with him, too, is that the kidney test in 2009 came back, my kidneys were fine, with the ultrasound, with the

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ultrasound test.

Q. Do you remember him discussing with you the importance of avoiding Motrin?

A. No.

Q. Okay. Did you ever take Motrin for headaches?

A. Yes, for sinus infection, sure. Sinus pressure.

Q. The records show that you were taking Motrin, like 1,200 milligrams daily for headaches in 2011. Do you remember that?

A. I don't remember it being that high. That's six pills a day three times. I don't remember.

Q. Okay. I mean, how long have you taken Motrin for?

A. On and off for my sinus infections.

Q. For how many years?

A. I don't remember.

Q. Okay. But you don't recall any discussion with Dr. Mishra about the importance of not taking Motrin because of the effect it might have on your kidneys?

A. Not at all.

Q. You're not saying it didn't happen; you just can't recall one way or the other?

A. I don't recall. No, I trust them. I would have cut back. The only thin, he said the Benadryl -- Benadryl is what I use for my sinuses -- been taking it since I was 14. He said that can raise the blood pressure.

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I was on decongestants. I got off the decongestants after it was pointed out to me that that could affect the heart, so I went to standard Benadryl.

Q. By the way, I think you said something like you have white coat syndrome, white coat hypertension?

A. White coat hypertension. Yes, I have it to this day.

Q You don't like going to the doctor's, I take it?

A. Well, it's white coat hypertension. You go there and your blood pressure is higher than it would be if you took it at home. Even to this day, when I go there once a month, they record very high, but at home, it's within the normal range, maybe a little bit high before dialysis but it drops quite low after dialysis, especially if I have edema at the time.

Q. I think you already mentioned to me Dr. Mishra, as your primary care physician, would treat you for the common cold or sinus infections from time to time?

A. Yes, everything.

Q. Okay.

A. Because I was on high blood pressure, I had to go see him every, I think three months, was it? Three months. He would give me scripts for three months for my blood pressure medicine. So I saw him every three months regardless whether I was sick or not. I was on

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a regular regimen, regular appointment with him, a regular schedule.

Q. Do you have allergies?

A. Penicillin. I have general allergies, hay fever, grass, pollen, tree pollen, stuff like that.

Q. How long have you had those allergies, to your knowledge?

A. Not penicillin -- probably since I was 14.

Q Do you take any medications for those?

A. Benadryl.

Q. How long has that been the case?

A. That I take Benadryl?

Q. Yes.

A. Since I was 14.

Q. You talk it every day?

A. When I need it. Right now it's a bad time of year, if you look at the pollen reports. Yeah, I'll be taking it daily.

Q. For example, the springtime, your allergies are probably worse than normal?

A. Yes, summer, settle down; winter, not too bad. But spring is usually the worst part.

Q. For example, in the spring, every year in the spring do you take Benadryl every day?

A. There's days when I don't. Sure.

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Q Do you take it most days in the spring?

A. Most days in the spring when I'm having problems, yes.

Q How many times a day do you take it?

A. Three probably.

Q. Do you know how much per dose?

A. Fifty -- No, they're 25s, so it's 25 to 50 milligrams per dose.

Q. Three or four times a day?

A. Yes.

Q. What about the rest of the year that's not springtime?

A. Sporadically.

Q A couple times a week?

A. A few times a week, yeah.

Q. Okay. Same thing, three or four times a day?

A. It depends. I mean, you never can predict your allergies, what's going to flare up your allergies, so I can't tell you.

Q. But you've used it regularly, fair to say, since --

A. For years.

Q. Do you have an allergist with whom you treat?

A. No, Dr. Mishra was basically -- Primary care and basically trusted him to direct me wherever I needed to go.

Q. Do you have asthma?

A. Yes.

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Q. How long have you had asthma?

A. Oh, that was before I quit smoking, is one of the reasons I quit smoking, too, so that's probably 17 years, 18 years, something like that.

Q. Do you take anything for asthma?

A. I have an inhaler.

Q. Okay. How often -- Sorry. Go ahead.

A. Along with the allergies, the asthma. Complicates my asthma. So now I take -- I've got Albuterol. I have an inhaler in my pocket.

Q. You just take it as needed on a daily basis?

A. Yes. It's not every day necessarily. But because it was quite bad I was on a steroid inhaler. I can't remember the name of it. Flovent, I think.

Q. Okay. I'm looking at your records from Dr. Mishra's records, December 22nd, 2008, so this would have been a few days before Christmas at the end of 2008. Dr. Mishra had diagnosed you with chronic renal failure; do you remember that?

A. No, he never told me that.

Q. You don't remember having any discussion with him about that then?

A. No, not at all.

Q. You had swelling in your legs at that time. Do you remember that?

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A. Yes. He said it was because of my weight problem.
Q So you don't remember any discussion December 2008 about having chronic renal failure?
MR. MASCIULLI: Asked and answered.
BY MR. DWAIHY:
Q You can go ahead and answer.
MR. MASCIULLI: Yeah, go ahead.
A. No.
BY MR. DWAIHY:
Q. When is the first time you recall having a discussion with Dr. Mishra about kidney failure?
A. He never discussed it with me. I never remember him ever telling me that except after my kidneys failed, I did visit him afterwards, so I was going to a new doctor but I had Mishra for so many years I trusted him, so I went back to him to have him control sinuses, asthma, whatever else. He does hypertension, too. Watch my hypertension and such. That day I went to him he said -- that's the first time he said my kidneys -- he told me my kidneys are going to fail. Up to that time I didn't know nothing.
Q. This is after Henry Ford Hospital?
A. Yeah, after.
Q. Did you ever ask him?
A. About the kidneys?

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Q. Yes.
A. Well, the creatinine number, he kept on mentioning that, called labs, and he said don't worry about it it was fine, it was within safe limits, is what he always told me.
Q. So throughout the years, and I'm looking at actually your Complaint here, you had like your BUN and creatinine tested by way of labs that Dr. Mishra ordered?
A. I didn't know about the BUN. He never told me about BUN, if he did BUN.
Q. You knew about the creatinine?
A. He would go through the things, or the lady would go through the things, or the doctor would go through the things with me and my wife and say, your triglycerides, this, that, and your kidney number -- I didn't know it was creatinine at the time -- was this, but as long as it's under five, you're fine, you're okay for now. That's all I remember any kind of reference to kidney besides the ultrasound which he came back and said, "Your kidneys are fine."
Q. Fair enough, but you knew the creatinine number, they were looking at that to gauge your kidneys; correct?
A. I thought it was just another number he had looked at. I didn't know if it was related to the

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Simvastatin or what. I don't know why they were looking at the creatinine.
Q. I'm sorry. I thought you just told me that either he or the nurse said this is your kidney number?
A. They said the kidney number. I didn't know why they were looking at it. Your question was -- I don't know why they were looking at it but they said the number was okay.
Q. In relation to your kidneys?
A. They did say in relation to your kidneys it was fine.
Q. And they had been monitoring that among other labs --
A. Yeah.
Q. -- for years?
A. Yeah, I trusted him. Whatever he said was good was good.
Q. For example, I'm looking at your Complaint in this case. Have you reviewed your Complaint?
A. Yes.
Q. Just by way of example, April 3rd, 2007, it says creatinine 1.2?
A. Say it again.
Q Says creatinine 1.2, April 3rd, 2007. So, for example, if you were at Dr. Mishra's office, and they drew your labs, he would routinely review your lab values with you; is that correct?

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A. No, he would call and get the lab results either from the medical assistant or from the doctor himself.
Q. After the office visit?
A. After the office visit he'd say call back on a Thursday or Friday for the results.
Q. And you would routinely do that?
A. Yes, or my wife.
Q. And from time to time they would, as they went through your labs, either Dr. Mishra or the nurse, I suppose, would say your creatinine, your kidney number, for example is 1.2, that's fine, it's less than five?
A. Sometimes they wouldn't even tell me what was what. Only things they would point out were things I had to work on, triglycerides, cholesterol.
Q. Okay.
A. Sometimes I didn't hear that number. I didn't hear until the leg started swelling they were monitoring something for kidneys. I never got a hard copy of the results. He never went through everything. He usually pointed out the bad stuff that I had to work on.
Q. Okay. I saw a reference in your medical records May of 2009 there was a bankruptcy filing; do you remember that?
A. 2009 bankruptcy filing?

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Q. Yeah, May 12th, 2003. Have you ever filed bankruptcy? Let me ask you that?

A. No. I was involved in a bankruptcy case. My corporation. There was a company that went out of business, was a vendor management company, and they went out of business, so it was a court in California that said what they wanted was the last three months from the date of filing, they wanted the three months, the money back.

Q. So you've never filed a bankruptcy personally?

A. No, it wasn't even my corporation. Another corporation I did business with file bankruptcy. The bankruptcy court wanted their money back they paid me for payroll.

Q. Understood.

A. No. I never did.

Q. And your company, your business, has never filed bankruptcy?

A. No.

Q. Your wife has never filed bankruptcy?

A. No, sir. Not that I'm aware of. Before I married her, but no, she's never told me.

Q. This January 3rd, 2011 visit to Henry Ford Hospital, we've talked a little bit about that; correct?

A. Yes.

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Q. I read your Complaint and this is the hospital visit to Henry Ford Hospital where you were diagnosed with acute end stage renal failure; is that correct?

A. Yes.

Q. Okay. From your Complaint it sounds like you were suffering from nausea. Do you remember that?

A. Yes.

Q. Vomiting?

A. Yes.

Q. Diarrhea?

A. Yes.

Q. Headaches?

A. Yes.

Q. When you got there they did some lab values; do you remember that?

A. Yes.

Q. You're creatinine was high?

A. Yes.

Q. Your BUN was high?

A. Yes.

Q. Do you remember your potassium being abnormal? If you recall.

A. That night I don't know what the heck -- I went in there for fluids and the flu and when they came back, the lab results -- I don't know the room was swarmed with doctors and nurses and techs and stuff like that. I didn't know what was going on. They asked me if I was on dialysis and I said no. They said, "Your number is way past where you should be on dialysis." I said, "I don't know what happened?" They said, "Your kidneys failed." So they took me to ICU, cut me open, yadda, yadda.

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Q. Do you know who told you that about your numbers being way past what they should be?

A. Emergency room doctor, attending doctor.

Q. Do you remember your protein values being way off?

A. No, they didn't elaborate on anything else. Numbers that night, they said it was way out of whack. Saying I'm showing signs of kidney, renal failure.

Q. Do you remember meeting with Dr. Provenzano?

A. Yes.

Q. He's a nephrologist?

A. Yes.

Q. You now know him to be Dr. Tayeb's partner?

A. Yes, they work out of St. Clair Specialty Physicians.

Q. This goes along with what you told me earlier in the deposition. When you met with him, he noted that your urine had been low for the past week prior to going to the hospital?

A. Yeah. About a week, yeah.

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Q. You had been getting labs every six months or so; does that sound about right?

A. I think it was six months. I had to go see him every three months, but I think he did labs every other time, I believe.

Q. Were you in any pain when you went to the hospital that day?

A. I was just sick. Couldn't keep nothing down. Just felt like food poisoning. I know the flu is respiratory. People call it the flu. I don't know, one of those viruses you get, throwing up and diarrhea is all I thought I had.

Q. Did you have any flank pain?

A. Flank?

Q. Right, like the lower back or your sides.

A. I don't recall any.

Q. Do you recall having any flank pain prior to that when you treated with Dr. Mishra?

A. No.

Q. I thought I saw a notation that you had an enlarged prostate?

A. No.

Q. You never had treatment for enlarged prostate?

A. No.

Q. On January 3rd, when you went to Henry Ford Hospital

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in 2011, they did do an ultrasound of your kidneys; you recall that?
A. Yes.
Q. And that was consistent with renal disease as they explained it to you?
A. Yeah.
Q. Do you remember?
A. I remember him doing it but it was just --
Q. Okay.
A. -- surreal. You know. Yeah, they were just doing the things, trying to keep me alive, treating me in ICU.
Q. And the Henry Ford records show that you saw either Dr. Provenzano or Dr. Tayeb at least a couple times during that admission from January 3 to January 9th. Do you remember that?
A. Yes.
Q. Do you remember a discussion about something called membranous glomerular, g-l-o-m-e-r-u-l-a-r, nephritis?
A. No.
Q. No? Okay. Do you remember getting a biopsy on your kidneys shortly after the hospital admission?
A. Yes.
Q. What was your understanding of the results of that biopsy?
A. I didn't hear about it until Provenzano looked at

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it --
Q. Okay.
A. -- at the clinic. When I was at the clinic, dialysis clinic.
Q. That would have been shortly after the Henry Ford admission?
A. Yes, it was probably in January, I believe. I was in full kidney failure, the kidneys were shot, basically.
Q. Provenzano told you?
A. Provenzano.
Q. Did you ever see Provenzano or Tayeb at their office?
A. No. Just at the clinic.
Q. Okay. And that's DaVita?
A. DaVita Clinic.
Q. In Clinton Township?
A. Yes.
Q. Okay. Do you recall discussing the option of having a kidney transplant with either Provenzano or Tayeb?
A. Tayeb, yes.
Q. That was, the records show, October 20th, 2011. Does that sound about right?
A. It's probably when Tayeb took over, yeah, somewhere around there.
Q. What do you recall about the conversation?
A. What I said?

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Q. What you said --
A. What I said or what he said?
Q. Anything. Tell me how you remember the conversation going, to the best of your recollection.
A. Well, Tayeb said that I should look at kidney transplant.
Q. He recommended it?
A. He recommended it.
Q. Okay.
A. He stated that in clinic 20 percent mortality rate every year, so average life expectancy was only five if you didn't get a transplant.
Q. Five years?
A. Yes.
Q. Did he say if you did get a transplant what your life expectancy would be?
A. Everything would be fine. At that time I finally started -- I don't know. Average kidney transplant only lasts five years, so --
Q. So he recommended getting a kidney transplant because in his opinion without a kidney transplant your average life expectancy would only be five years?
A. That's basically what he led me to believe, yes.
Q. And with a kidney transplant he said you basically would be fine?

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A. Yeah, indefinitely, until the kidney failed.
Q. And you said something about the, average life --
A. I've heard from people, talking to people in the clinic and stuff like that -- there's this one gentleman on home dialysis right now, he's on his third kidney transplant. He's older than myself. His longest one was about five years, his shortest one was 24 hours.
Q So Dr. Tayeb didn't tell you it would only last five years? This is information you gathered around the clinic?
A. What people were telling me.
Q. Other patients?
A. Other patients.
Q. You refused. You were not interested in a kidney transplant?
A. Not at that time, yes.
Q. Why is that? Based on what you heard from other people?
A. Other people, basically.
Q. Okay. And then that same note that we've been talking about, October 20th, 2011, Dr. Tayeb, in his note, said you were researching transplant information; do you remember that?
A. Yeah. I researched it after he started pushing a

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little more. Then rejection drugs were a concern of mine, too.

Q. Tell me where you were researching.

A. The internet.

Q. Any particular sources on the internet?

A. No, just general.

Q. Okay. Did you save any of your information?

A. No.

Q. Okay. You didn't print any of it out?

A. No, I got three hours a night to read the internet. I started reading. He wanted me to do transplant. I started reading on that.

Q. Okay. His note on October 20th, 2011 says he discussed in detail with you kidney transplant. Is that how you remember it?

A. Yeah, he went through details and he said that rejection drugs aren't -- rejection drugs is the big problem there, and how long is a transplant going to last.

Q. Okay. Have you reconsidered that position at all? Do you have any plans to undergo a kidney transplant?

A. Possible. Depends on quality of life.

Q. Have you discussed it with any of your treating physicians including Dr. Tayeb or anyone else?

A. He asks me once in a while if I changed my mind. I

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said I'm still researching. My wife has volunteered to give me a kidney. What I'll do is probably compatibility test on it, see if she can give her kidney to me, in case I do get -- end up in a hospital almost dead again, then, yeah.

Q. Have you made any appointments to do any compatibility testing?

A. No.

Q. Have you made any appointments with physicians or other medical care providers about talking about formally a kidney transplant?

A. No.

Q. Okay. So it's all just been kind of you looking on the internet, no particular source, and Dr. Tayeb will mention it to you once in a while?

A. Well, there's his group and other groups. I looked at the groups he gave me. One social worker gave me a list of different hospitals that do it. I do stuff like that.

Q. Is it your understanding that you're a candidate based on what Dr. Tayeb told you for a kidney transplant?

A. Anybody I guess is as long as you're halfway healthy.

Q. You only see Dr. Tayeb at DaVita; correct?

A. Yes.

Q. How often do you go there now?

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A. Once a month.

Q. Dr. Rizk, R-i --

A. Rizk.

Q. R-i-z-k --

A. Vascular surgeon.

Q. Who did your fistula; correct?

A. And my permacath.

Q. Okay. When did you have a permacath, while you were at Henry Ford Hospital?

A. Before I got out of Henry Ford, yes.

Q. Have you seen him since then?

A. Yes. For, what do they call it? Narrowing. He did an angioplasty basically on it.

Q. And when was that again?

A. It was shortly after home dialysis, after I started home dialysis, so either end of 2011 or 2012. I don't remember.

Q. Fair enough. Besides the people at DaVita, Dr. Tayeb, Dr. Rizk, Dr. Provenzano, any other treaters you see for your kidney problems?

A. Just my nurse, my tech, my social worker, my dietician.

Q. Those are all at DaVita; right?

A. Yes. Just DaVita people.

Q. Who's your primary care physician now?

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A. Tayeb basically.

Q. You don't have a family doctor, an internist you go to see?

A. No. I have had sinus and problem and asthma problems and I said I pay him enough, he can look at that because he's also an internist. I'm trying to get my money's worth out of him.

Q. Do any of your family members treat with Mr. Mishra? I think you told me your mom?

A. My mom did.

Q. Anyone else?

A. No. My wife went to him once I think for hypertension. She has a different doctor now, female doctor.

Q. When did she see Mishra for hypertension?

A. Geez.

Q. Let me ask you --

A. Ten, 15 years ago. We're married 22 years, so --

Q. Okay. Fair enough. Before you went to Henry Ford Hospital in 2011?

A. Yeah, way before that.

Q. Had Dr. Mishra ever referred you out to any other, to any doctors, any specialists throughout your course of treatment with him that you can recall? And if you can't recall, it will be in the records.

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A. I'm just saying with kidney stones I've had. I think that was before Dr. Mishra.
Q. I did see a reference in the records of you suffering kidney stones but that was before 2000; correct?
A. Yeah. Last one was in '86. And the first one was when I was 19.
Q. Did you ever discuss with Dr. Mishra possibly seeing a nephrologist at any point in your treatment with him?
A. No, I was not aware anything was wrong. He told me everything was okay.
Q. But you never just asked him about it based on any research you did?
A. I didn't research it. I was trusting my doctor to tell me when I needed to go somewhere, I'd go somewhere.
Q. Any other physicians that you treated with besides Dr. Mishra throughout the years?
A. Before Mishra?
Q. No. You started treatment with Mishra in '88, I think; right?
A. Yeah, I was with him a long time.
Q. Besides him, anyone you saw regularly or semi-regularly?
A. (Indicating in the negative).
Q. Okay.

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A. Not that I recall, no.
Q. Okay.
A. Once I met him, he was my primary care and figured he could, whatever, watch everything for me.
Q. Okay. Do you have any health care professional in your family? Any doctors, nurses?
A. No.
Q. Okay. Any close friends that are health care professionals?
A. My stepkid's niece, whatever. We see her quite frequently. She's a physician assistant for DMC Sports Medicine. She's an orthopedic surgeon and stuff.
Q. Did you ever discuss your medical problems related to your kidneys with her?
A. No. I let her watch. I let her watch me do dialysis at home. She had never seen it before, she wanted to see it, so I allowed her to see it.
Q Any family members ever accompany you to office visits with Dr. Mishra?
A. No, I don't remember. I always go myself.
Q. Okay.
A. Might have been a time my wife might have drove me if I was sick, once or twice, but not regularly.
Q. Fair enough.

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A. They'd wait in the waiting room. Never in the exam room.
Q So you haven't ruled out a kidney transplant but you don't have imminent plans to undergo a kidney transplant; is that fair?
A. I don't trust doctors no more. So I'm not going to take advice of one doctor to get a transplant as the best for me, so I have to do my own research now. I don't trust anybody anymore since this happened.
Q. You don't have any plans imminently to undergo a transplant, though; is that correct? I'm just kind of reiterating what I understood you have said before.
A. Day to day, just trying to stay alive and keep my marriage together and try to keep my sanity right now. That's about -- transplant, I don't know if that's the cure-all or not. You know.
Q. Okay.
A. My wife was up at 3:00 o'clock in the morning last night. I got -- My family's more important to me than myself.
Q. Okay.
A. They come first. Right now my daughter's at -- she's got something wrong with her knees. Doing some MRIs. I should be with her but I had to come here.
Q We're almost done.

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A. That's what I'm saying, the transplant is going to cost money. I don't have right now extra money under this thing. The checkout is extensive. I don't think I can afford it.
Q. Well, what's your understanding as to what Medicare and/or your supplemental Blue Shield-Blue Cross policy will cover?
A. My old -- I have to check into it. I don't know what they're going to pay. All I know, I've got the supplemental. I was told by social worker and the insurance worker at DaVita that would cover the whole dialysis for me, a hundred percent that Medicare didn't cover.
Q. You haven't asked Medicare or Blue Care whether a transplant would be covered?
A. No. Like I said --
Q. That's fine.
A. Like I say, I'm working on trying to pay the bills. And I come second.
Q. Fair enough. And your treatment currently is your home dialysis and your monthly visits to DaVita; correct? Yes?
A. Yes.
Q. Any other treatment that we haven't discussed?
A. For what?

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Q For your kidneys.
A. No.
Q Okay. And any other major medical problems you're being treated for right now?
A. Just allergies and asthma.
Q. Okay.
A. My hypertension, but that seems under control now. Since I started dialysis and don't have the edema, the water retention, my blood pressure's a lot better shape now.
Q. Okay. And who prescribes the hypertension medication, Dr. Tayeb?
A. Yes. This particular one was Provenzano and Dr. Tayeb just continued on because it is working for me.
Q Okay. Do you have an understanding as to what your prognosis is based on your discussions with Dr. Tayeb?
A. I don't know.
Q. Have you had a discussion with him about it?
A. One week he told me 20 percent mortality rate in the clinic. He doesn't know what the numbers are for home dialysis. So by that, and any time you start to read, that just throws you in depression, so you don't want to read too much about kidney disease, it is very bad, very serious, and five years is the life expectancy and I've got three already, so I don't know. I don't

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know.
Q. Okay.
A. But in the meantime I've got to keep the family going, pay the bills, keep the house. My wife's minivan's transmission just went. It's $2,000 I don't have. My kids are in college. I can't help them. My daughter's car needs work. I'm screwed right now.
Q. Okay. I'm almost done. You signed an affidavit in this case -- You want to take a break?
A. Yeah.
(Off the record at 4:37 p.m.)
(Back on the record at 4:40 p.m.)
BY MR. DWAIHY:
Q. By the way, when we were off the record, you mentioned you had a couple grandchildren?
A. Yes.
Q. Congratulations. Can you tell me their names and ages?
A. Kendall is two and Lucy is a year and a half.
Q Okay. And who --
A. My stepchildren.
Q. Your stepchildren?
A. Yes.
Q. From your stepson or your stepdaughter?
A. One of each.

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Q One of each?
A. Yes.
Q. Let me ask you about you signed an affidavit in this case. Do you remember that?
A. Yes, I do.
Q. And I take it you did not prepare this affidavit but your attorneys did?
A. Yes.
Q Okay.
A. Yes.
Q. There's no date on it. Do you remember when you prepared it or when you signed it, reviewed it and signed it?
A. Isn't the notary on there? Didn't the notary sign it. Looks like --
MR. MASCIULLI: On there just said her commission expires.
BY MR. DWAIHY:
Q. Let me try to help you.
A. Jeff met and we went to the notary.
Q Who's Jeff?
A. One of the young attorneys in his firm.
Q. That would have probably been sometime in 2014, this year?
A. I believe so.

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Q. Let my ask you this: Who's the main attorney that you deal with on this case? Is it Mr. LaParl?
A. Yes.
Q. Did you consult any other attorneys before consulting the McKeen law firm or Mr. LaParl?
A. Did I call anybody?
Q. Right. Tell me who you called. I don't want to know anything about the substance of your conversations. Just tell me who it was.
A. Ed Greenup. It's my wife's girlfriend's, since high school, husband.
Q. Friend of the family?
A. Yes.
Q. Do you remember when you called him for the first time?
A. Shortly after September 20th of 2012 once Tayeb said that, went on and on about "why didn't your doctor send you to one of us and we could have kept you off dialysis and maybe never go on dialysis or prevented kidney failure."
Q. Is that the first attorney you consulted?
A. Greenup.
Q. Yes.
A. And he doesn't do those cases.
Q That's all I need to know.

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A. He was the initial and then he gave me some names and someone else gave me a referral to them.

Q. Did you ever have a conversation with your wife about possibly filing a lawsuit against Dr. Mishra?

A. A conversation with her?

Q. Before you consulted an attorney?

A. Yes, we have an open marriage. We discuss everything.

Q. That's what I figured. Do you recall the first time you discussed it with your wife, "I think something might be wrong here"?

A. As soon as I walked out of the office September 20th I gave her a call. I said, "Oh, my God. I think Mishra screwed up."

Q. Okay. How is it that you remember September 20th, 2012?

A. Because it's the third Thursday of every month that I go in for clinic.

Q. Okay. And --

A. Same thing, I remember September 10th when I quit smoking. It's just very important dates in my mind.

Q. All right. And what do you recall Dr. Tayeb telling you? This would have been at DaVita?

A. Yes.

Q. Was anyone else in the room when you had this --

A. Yes.

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Q. Who else was?

A. Josie, my nurse; Sylvia, my technician; my dietician -- I don't remember her name. They really go easy on the names because they don't like personal relationships because most of us die so soon, and Carrie LeGrand, my social worker. They were all in the room. They were kind of shocked because Tayeb went on and said, "Why wasn't your doctor sending you to a nephrologist?" I was shocked, too. I didn't know anything was wrong. I thought it happens, it happens.

Q. All right.

A. I was shocked. So I called my wife after that on the way home. I was dumbfounded. I didn't know what to say. I was totally shocked. And I don't know. So we probably discussed it that night and probably called our friend, Greenup, Ed, within a day, next day or two.

Q. Tell me exactly what you remember Dr. Tayeb telling you at that visit.

A. He came in and what it was, he got full biopsy, not just a short version out of Clinton Henry Ford, out of Detroit. He got that and read through it and reviewed the case and talked to the pathologist, I guess, and he goes, "I got your full pathology report here," and he goes, "Did your doctor -- Why didn't you come to a nephrologist?" I said I was with an internist. The internist said everything was fine as long as the creatinine number was down a certain thing, you'd be fine. So he said I need to go. Then he started ranting, saying, "The doctor should have sent you. I could have kept you off of dialysis. You should have came here years ago. I could have prevented you from being on dialysis and you going into full kidney failure, if you would have came to a nephrologist early on."

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Q. Did he say how early on?

A. Since 2008, showing signs, should have came to him and switched to a nephrologist. He went on.

Q. Okay.

A. I think it lists them. I was shocked. I was dumbfounded. That was like someone punching me in the gut.

Q. All right. Did Dr. Provenzano ever tell you anything similar to that?

A. No.

Q. Okay. It was only Dr. Tayeb?

A. Yes.

Q. And you had seen Tayeb before that, though; correct?

A. Yes.

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Q. Starting in January?

A. On home dialysis, yes.

Q. But you saw him -- Did you see Dr. Tayeb in 2011 at Henry Ford or only Provenzano?

A. It was Provenzano. I seen Tayeb in the clinic but he never looked at me or talked to me or gave me care until I was on home dialysis.

Q. It was all Provenzano up until that point?

A. Yes.

Q. Okay. And when did you start home dialysis again?

A. November of 2011.

Q. Okay.

A. The only reason I went on home dialysis is because it gave me a way to work because regular dialysis was three and a half to three and three-quarters hours Tuesday, Thursday, Saturday, so it was hard to get any kind of work where I couldn't work Tuesday, Thursday. I'd be washed out. I'd be -- I mean people -- they almost passed me out a couple times. I almost passed out a couple times on dialysis because I was so bad. They took off the liquid. I almost passed out. Then they backed it off. Hopefully they caught you before you passed out. Once you pass out, then they give you saline. If that doesn't revive you, they ship you across the street and they say you can go in a coma.

That happened a few times. It scared the hell out of me. I wanted home dialysis where I'm in charge of my blood pressure instead of their cuff going off every 15 minutes to a half hour, check my blood pressure, alarm me. When that happens, I have my own cuff, so I could tell. My legs start to ache and stuff like that.

I seen Tayeb, I'm sorry. Off on the topic. But no, I didn't see Tayeb until I was on home dialysis. And I did not know. I trusted Mishra with my life.

Q. Okay. Have you reviewed any of your medical records in this case?

A. I glanced at them.

Q. You told me before you reviewed the Complaint that was filed in this case?

A. I glanced at it. I figured these guys knew what they were doing. That one I did know about and I did read it.

Q. The affidavit?

A. Yes, I read that thoroughly.

Q. And did you have an understanding that you signed this affidavit in response to a motion --

A. Yes.

Q. -- that was filed by the defendants? Did you know

that or no?

A. It was filed by the defendants? I don't know what you're saying. I don't understand that.

Q. I understand. It was a bad question. Let me ask you this: What was your understanding as to why you were signing this affidavit?

A. It was just required for the case.

Q. Okay. Nothing beyond that?

MR. MASCIULLI: Privilege here in terms of --

BY MR. DWAIHY:

Q. I don't want to know anything you discussed with your attorney. I just want to know, did you have any more specific understanding as to why you signed this affidavit other than it was just generally required for the case? And if that's all you knew, that's fine.

A. I don't remember anything else being discussed about that. It just was required for the case. I didn't know if it was initiated by you guys, if it wasn't. I don't know.

Q. Did you review any of your medical records before you signed the affidavit?

A. No.

Q. Okay. You didn't have to review any records to figure

out September 20th, 2012 was the date that Dr. Tayeb told you this?

A. When something like that happens to you, you're going to remember it.

Q. Okay. So September 20th, 2012 is the third Thursday in the month?

A. Yes.

Q. Okay.

A. Sometimes see if he's going back to India or something like that he'll change it, but usually religiously the third Thursday of the month. They don't call me. I just show up at the clinic at my scheduled time.

MR. DWAIHY: Those are all the questions I have for you, sir. Nice to meet you.

A. Nice meeting you.

MR. DWAIHY: Good luck to you.

MR. MASCIULLI: I do not have any questions for the record. Thank you.

(The deposition was concluded at 4:50 p.m. Signature of the witness was not requested by counsel for the respective parties hereto.)

CERTIFICATE OF NOTARY

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

I, JOANNE SMITH, certify that this deposition was taken before me on the date hereinbefore set forth; that the foregoing questions and answers were recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to, either party nor interested in the event of this cause.

Joanne Smith

JOANNE SMITH, CSR-3099,
Notary Public,
Wayne County, Michigan
My Commission expires: 1-24-17

EXHIBIT E

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

Kerry Jendrusina

Plaintiff,

vs.

Case No. 13-3802-NH
Hon. James M. Biernat, Jr.

Shyam Mishra, M.D.,
Shyam N. Mishra, M.D., P.C.,
Jointly and Severally,

Defendants.

/

BRIAN J. McKEEN (P34123)
JOHN R. LaPARL, JR. (P39549)
McKEEN & ASSOCIATES, P.C.
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Attorneys for Defendants
10 S. Main Street, Suite 400
Mt. Clemens, MI 48043
(586) 466-7607

/

AFFIDAVIT OF KERRY JENDRUSINA

STATE OF MICHIGAN)
)
COUNTY OF Macomb)

KERRY JENDRUSINA, being first duly sworn, states and deposes as follows:

1. That I commended a medical malpractice action against the above named Defendants;

2. That on September 20, 2012, my treating nephrologist, Dr. Jukaku Tayeb, informed me that the damage to my kidney was not bad in January of 2011, and that I should have been referred to a nephrologist in 2008 when my kidney issues began;

McKeen & Associates, P.C. ♦ 645 Griswold Street, Suite 4200 ♦ Detroit, MI 48226 ♦ (313) 961-4400

3. That on September 20, 2012, Dr. Tayeb informed me that if I had seen a nephrologist sooner, my kidney failure and use of dialysis could have been delayed or possibly eliminated with proper care and treatment;

4. That I first discovered the existence of my claim during the aforementioned conversation with Dr. Tayeb on September 20, 2012;

5. That after discovering the existence of my claim on September 20, 2012, I promptly contacted McKeen & Associates, P.C., on September 25, 2012 in order to obtain representation in my claim against the above named Defendants.

Affiant sayeth further not,

KERRY JENDRUSINA

DEAN VANSLAMBROUCK
Notary Public - Michigan
Macomb County
My Commission Expires May 27, 2015
Acting In the County of MACOMB

EXHIBIT F

STATE OF MICHIGAN COUNTY OF MACOMB CIRCUIT COURT FAMILY DIVISION	ORDER	Case No. 13-3802-NH CT

KERRY JENDRUSINA Plaintiff(s) Attorney: JOHN LAPARL P# 39549

VS

SHYAM MISHRA, M.D., et al Defendant(s) Attorney: PAUL DWAIHY P# 66074

At a session of the Court, held on December 23, 2013

ORDER OF DENIAL OF MOTION FOR SUMMARY DISPOSITION
Title of Order

IT IS ORDERED:

FOR THE REASONS STATED ON THE RECORD, THE DEFENDANT'S MOTION FOR SUMMARY DISPOSITION IS DENIED WITHOUT PREJUDICE.

FILED
2013 DEC 27 A 11:19
MACOMB COUNTY
MT. CLEMENS, MICH.

CIRCUIT JUDGE

Approved as to form and substance by:

Signature of attorney for plaintiff

Signature of attorney for defendant

(5/25/04)

EXHIBIT G

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

– – –

KERRY JENDRUSINA,

Plaintiff,

vs. Case No. 13-3802 NH

SHYAM MISHRA, M.D., ET AL

Defendants.
_____/

PROCEEDINGS

BEFORE THE HONORABLE JAMES BIERNAT, JR., JUDGE

Mount Clemens, Michigan - September 29, 2014

APPEARANCES:

For the Plaintiff: John R. LaParl, Jr.—P39549
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645 Griswold St Ste 4200
Detroit, MI 48226

For the Defendant: Paul J. Dwaihy—P66074
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Deborah J. Doyle, RPR, CSR 2179
Official Court Reporter
40 North Main Street
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(586) 469-5179

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Mount Clemens, Michigan

September 29, 2014

At about 10:52 a.m.

– – –

(REPORTER'S NOTE: "Inaudible" means a word or words were not heard well enough to be able to discern a proper interpretation either because of shuffling of papers, or the speaker did not talk loud enough, or was not picked up by the microphones.)

(Court and Counsel present.)

THE COURT: Kerry Jendrusina versus Dr. Shyam Mishra.

MR. DWAIHY: Good morning, Judge. Paul Dwaihy on behalf of Dr. Mishra.

MR. LaPARL: Good morning, Your Honor. May it please the Court, John LaParl appearing on behalf of Plaintiff, Mr. Jendrusina.

THE COURT: All right. This is the Defendant's motion for summary disposition. This was filed before, correct, and I dismissed it

without prejudice. It was premature and there was discovery and basically --

MR. DWAIHY: Sorry to interrupt you, Judge. I was going to say that is exactly right.

This is a motion for summary disposition based on the statute of limitations defense.

The claim in this case, very briefly, is essentially my client, Dr. Mishra, failed to treat the plaintiff's kidney disease and refer him out to a nephrologist, a kidney specialist for treatment of his kidney disease. That is the gist of the allegations.

We have completed some discovery, most significantly of which is the Plaintiff's deposition and we also obtained some further medical records since we were before you last.

The issue in this case relative to this motion is the discovery rule, the six month discovery rule. The general statute of limitations in a medical malpractice case is two years. That is long since expired. There is no argument against that.

The only question is should Mr. Jendrusina have known of a potential cause of

action earlier.

We say yes, and here is why. There is one main event that occurred in this case.

January 3, 2011 Mr. Jendrusina was admitted to Henry Ford Hospital Macomb. He was diagnosed at that time with kidney failure, acute kidney failure. He testified to that in his deposition, which had not occurred when we were before you last time.

He testified he was admitted to Henry Ford Hospital January 3, 2011. He testified as to his various symptoms. I won't go through all of them. They are included in our motion. He was vomiting, he had diarrhea, he had headaches. He was very sick. He had abnormal lab values.

And he testified that the treaters at Henry Ford told him your numbers, meaning is BUN and creatine, his kidney value numbers, are way past where you should be on dialysis. Your kidneys have failed.

This was consistent with renal disease, as they explained to --

He is explaining this all, this is Mr. Jendrusina explaining this during his deposition.

He was in kid --

Full kidney failure. His kidneys were shot, basically, was his testimony.

Our contention from the start has been if he is claiming our client should have diagnosed him with kidney failure or referred him out to a nephrologist, most certainly when he is admitted to the hospital and the treaters at the hospital tell him: You are in kidney failure. You need to be on dialysis --

Which, by the way, he also confirmed in his deposition that it was during that hospital admission --

THE COURT: When was that again.

MR. DWAIHY: January 3rd, 2011.

THE COURT: Okay.

MR. DWAIHY: He was placed on dialysis shortly --

During that hospital admission or shortly thereafter. Most certainly if that is the case, he should have known of a potential cause of action.

And I also want to highlight the fact, Judge, I think we talked about this last time. This is an objective standard, this is not a subjective standard. The case on that is also in

our brief. It is called Solowi, S O L O W I.

The six month discovery period begins to run when? On the basis of objective facts, the plaintiff should have known of a possible cause of action.

There is another case called Kroll, K-R-O-L-L. This is also in our brief. Even if a Plaintiff is not clear on the details of the evidence or the identity or the rules of all of the alleged tortfeasors or precisely what it was that they did wrong, it is the Plaintiff's duty to begin prosecution of the case as timely required by the law.

So it is an objective standard. And our argument from the beginning has been: If you are diagnosed with kidney failure, if you are put on dialysis, most certainly you should have known objectively speaking about possible lawsuit.

But even going further, and now that we have taken the Plaintiff's deposition. Even going further and giving him every conceivable benefit of the doubt. If we fast forward some ten months later to October 24th, 2011. Really almost eleven months later. He is treating with a nephrologist now, Dr. Tayeb, who tells him on

October 24th, 2011. And he admits this in his deposition. That you should consider a kidney transplant. This is page 66 and 67 of Mr. Jendrusina's deposition.

The records show on October 20, 2011, may have been October 24th, but October 20th or October 24th, 2011 that he had a conversation with Dr. Tayeb about a kidney transplant.

Mr. Jendrusina says: Well, Tayeb says that I should look at a kidney transplant on that date.

So really this is eleven months after he is diagnosed with kidney failure. Eleven months after he is admitted to the hospital on an emergent basis. Eleven months after he is placed on dialysis and starts treating with a nephrologist, a kidney specialist. That kidney specialist tells him: You really need a transplant. You should consider this.

Even that six months after that his claim would have been barred April 24, 2012. He doesn't serve his NOI, which in a medical malpractice case tolls the statute of limitations. He doesn't serve his NOI until almost a year later, March 18, 2013.

So giving him every benefit of the doubt, certainly in the light most favorable to the Plaintiff, he could have done it April 24, 2012. He doesn't do it until March 18, 2013. Those are just the facts.

Last issue I would like to address, Judge, is this affidavit. And he had this, plaintiff produced this affidavit last time we were here. It is signed by Mr. Jendrusina himself. And it says: Well, Dr. Tayeb told me on September 20th I think it was. September 20th, 2012 that if I was earlier referred I could have avoided all of my kidney problems, or some of my kidney problems.

Our argument back then and now is again, that is hearsay. That is inadmissible under MRE 801 and 802. So I don't even think it should be considered. But even if you do consider it, we now have the records of Dr. Tayeb, which is Exhibit G to our motion, from September 20, 2012. It says absolutely nothing to that effect.

But even if you want to ignore that and consider the affidavit for what it says, for purposes of this motion, I am willing to take it

as true, and take it on its face, Judge. Because there is no getting around the fact, under an objective standard, by April 24, 2012 six months after that same doctor, Dr. Tayeb, told him: You need a kidney transplant. I don't see how the Plaintiff can say by an objective standard he shouldn't have known of a possible lawsuit.

If the standard was subjective, which is really what they are trying to make it. There would be no statute of limitations. It would be effectively abolished if every time we had a situation like this the plaintiff could say: Well, I didn't know I had a lawsuit until my lawyer told me.

Or: I didn't know I had a lawsuit until one of my treating physicians suggested it to me. There would be no statute of limitations. He would have --

Every plaintiff would have six more months to discover this potential lawsuit.

THE COURT: Okay. Response.

MR. LaPARL: Thank you, Your Honor. May it please the Court, this is the identical motion that the defense brought late last year and we are argued in December.

All of the facts that they just presented were before the Court when we were here back in December. The only difference is that the deposition of Mr. Jendrusina has now been taken and that bolsters his position that it was in September, September 20, 2012 that he discovered, had any reason to believe, that he had a claim for malpractice.

And what is important about that is the conversation that he had at that time with Dr. Tayeb was Dr. Tayeb telling him: Had I known about all of the treatment that had taken place prior to this, had I known about these lab values, had you been referred to me back then, then there was treatment that could have been instituted to prevent you from going into kidney failure.

When we were here the last time he discussed exactly the same things. Now it is undisputed that in 2011 he was told that his kidneys were in bad shape. What he didn't know then was that had he been referred to a nephrologist at an earlier time. Something could have been done to prevent the cascade of events that led to that outcome.

There is nothing new. There is nothing different other than Mr. Jendrusina's testimony that is crystal clear that it was on September 20, 2012 that he had any reason to believe that he had a malpractice claim.

And just because he is diagnosed with a condition prior to that doesn't therefore mean that he had any reason to believe that he had a cause of action.

So I don't see anything new or different than what we had when we were here last December, unless the Court does. If there is some issue that the Court would like me to address, I am happy to address it. But this is the exact same issue. Under an objective standard --

He is not a physician. He is not a nephrologist. He is not an internist. He had no reason to believe until his physician told him that an earlier diagnosis would have made any difference.

MR. DWAIHY: Judge, if I may briefly. I don't know, I mean I can't speak to what Your Honor was thinking, but you know, I am not presuming that you denied my motion without

prejudice for my benefit.

Our position at the time was respectfully we didn't need any more discovery. The facts are what they are. You know, let the plaintiff have some more time to see if they can come up with something in the off chance to create a factual question, and they have not.

So in that regard everything now is the same as it was then. That is true. We have taken plaintiff's deposition and he confirmed our discussion, our argument in our original motion. And we have --

THE COURT: Do you agree with that.

MR. LaPARL: I agree, but I think there is still a question of fact. If my client says that I had no reason to believe until I was told that, I think that that is entirely reasonable. That creates a genuine issue of material fact.

MR. DWAIHY: To one of his other points, Your Honor. No plaintiff --

I guess it is possible. But how many times do you have a plaintiff who is a doctor in a medical malpractice case. I am sure it has happened. But that certainly not the norm. They are usually not an internist or a nephrologist.

And they are certainly not usually a lawyer. And so that is irrelevant. And that gets back really to what this motion is about, which is the objective standard. He is judged by the law. This is the facts are what they are, and the legal standard is objectively speaking, not what was in Mr. Jendrusina's mind, purportedly, but objectively speaking. Should he have known, not did he know, but should he have known of a possible, potential lawsuit.

And I don't know how you can argue under the law when he is diagnosed with the condition he is claiming that my client should have diagnosed him with, he didn't know of a possible lawsuit on that basis.

THE COURT: All right. I will take this under advisement, issue a written opinion.

MR. DWAIHY: Thank you, Judge.

MR. LaPARL: Can I say one further thing?

THE COURT: Oh, go ahead. Go ahead.

MR. LaPARL: There are certainly cases in which under an objective standard a nonmedical person would have reason to believe. This is not one of them. This is an extremely complicated

situation. And how would he know that a referral to a nephrologist at an earlier time could have prevented the kidney failure. He is not medically trained. He doesn't know what treatments are available. And so this is certainly a case --

THE COURT: Do lay people usually know what treatments are available.

MR. LaPARL: No.

MR. DWAIHY: No. And he doesn't have to know, Judge. That is the whole point. He is probably not going to know. So I think that analysis is irrelevant.

By the way, the affidavit that he signed, which again I don't think should be considered, but I will take it as true for purposes of this motion only.

To the date he is claiming on September 20, 2012, that is when he suddenly came to this realization. To the date that meets the statute, six months later.

THE COURT: All right. I will --

MR. LaPARL: Well, he went to a --

He consulted a lawyer shortly after that and the Notice of Intent was timely filed.

That is irrelevant.

MR. DWAIHY: Well, if you use that date. And again, that is not the standard.

THE COURT: All right.

MR. DWAIHY: Thank you, Judge.

THE COURT: All right. Thank you.

CERTIFICATE OF REPORTER.

STATE OF MICHIGAN)

) SS

COUNTY OF MACOMB)

I, Deborah J. Doyle, a Certified Shorthand Reporter for the State of Michigan, do hereby certify that this transcript, is a complete, true and correct transcript, to the best of my ability, of the proceedings and testimony taken in this case and that this is a full, true, complete and correct transcription of said proceedings.

I further certify that this transcript was prepared by me, or under my supervision, from a videotape copy supplied to me by the Circuit Court of Macomb County Court, the original of which was duly recorded by means of videographic technology, monitored and logged by the Court on the date(s) and time(s) set forth herein.

/s/ Deborah J. Doyle

Deborah J. Doyle, RPR, CSR 2179

DATE: 12-17-14

EXHIBIT H

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

KERRY JENDRUSINA,

Plaintiff,

vs. Case No. 2013-3802-NH

SHYAM MISHRA, M.D.,
SHYAM N. MISHRA, M.D., P.C.,
Jointly and Severally,

Defendants.
_____/

OPINION AND ORDER

This matter is before the Court on defendants' motion for summary disposition pursuant to MCR 2.116(C)(7).

I.

Plaintiff alleges that defendants were his primary care providers for more than 20 years, during which his renal function slowly began to decline such that he was diagnosed with renal insufficiency in June 2007. However, he alleges that defendants never referred him to a nephrologist and likewise failed to counsel or educate him on the importance of avoiding certain medications, blood pressure monitoring, and dietary modifications. He alleges that on January 3, 2011, he presented to Henry Ford Macomb Hospital complaining of nausea, vomiting, headaches, and diarrhea, at which time laboratory tests showed that he was in acute renal failure which required hemodialysis. Further, he alleges that he remained in the hospital until January 9, 2011 and that he currently undergoes hemodialysis multiple times per week for his end-stage kidney disease. It is his position that defendants were negligent in failing to order the

appropriate diagnostic testing, properly educate him about his chronic kidney disease, and refer him to a nephrologist, among other things.

In the motion at hand, defendants argue that plaintiff's claims are time-barred. Plaintiff disputes such position.

II.

In considering a motion brought under MCR 2.116(C)(7), the Court must accept as true all of the plaintiff's well-pled allegations and construe them in the plaintiff's favor. *Hanley v Mazda Motor Co*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence to determine whether there is a genuine issue of material fact. *Id.* Summary disposition is inappropriate where a material factual dispute exists such that factual development could provide a basis for recovery. *Kent v Alpine Valley Ski Area, Inc,* 240 Mich App 731, 736; 613 NW2d 383 (2000).

III.

At the outset, the period of limitations for a malpractice claim is 2 years from the date that the claim accrued. MCL 600.5805(1), (6). Moreover, MCL 600.5838a provides that:

> (1) For purposes of this act, a claim based on the medical malpractice... accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.
>
> (2) ...an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805...or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later...The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff. A medical malpractice action that is not commenced within the time prescribed by this subsection is barred...

This jurisdiction does not recognize a continuing-wrong or continuing-treatment rule for the purpose of extending the accrual date. *McKiney v Clayman*, 237 Mich App 198, 208; 602 NW2d 612 (1999). The 6-month discovery rule commences when the plaintiff, on the basis of objective facts, is aware of a possible cause of action. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 232; 561 NW2d 843 (1997). Such a situation "occurs when the plaintiff is aware of an injury and a possible causal link between the injury and an act or omission of the physician." *Id.* When the plaintiff receives a correct diagnosis from another physician, the plaintiff either knows or should know that the previous treatment was improper. *McGuire v Bradley*, 137 Mich App 287, 290; 358 NW2d 4 (1984).

The complaint is vague as to the actual date of the purported malpractice in that it alleges that defendants had been his primary care providers for more than 20 years, he was diagnosed with renal insufficiency in June 2007, was admitted to the hospital on January 3, 2011 for acute renal failure, and started hemodialysis such date. Further, the complaint contains a chart showing plaintiff's laboratory values from April 3, 2007 through December 14, 2010. According to the chart, plaintiff started out with a kidney function of approximately 60% and ended with a kidney function of only 12%. There is no dispute that plaintiff did not serve his notice of intent (NOI) until March 18, 2013 and did not commence the instant suit until September 17, 2013.

Using the latest date of January 3, 2011, the Court finds that the general 2-year limitations period under MCL 600.5805(6) expired on January 3, 2013. With respect to when plaintiff discovered or should have discovered his claim under MCL 600.5838a(2), plaintiff testified that defendants informed him in 2008 that while his blood work showed that the kidney values were somewhat elevated, there was nothing to worry about at that time. [Plaintiff's dep. at 48]. He denied that defendants told him in 2008 that he had been diagnosed with chronic

kidney failure. [*Id.* at 56]. He also indicated that he underwent a kidney ultrasound in 2009 and was informed that his kidneys were fine. [*Id.* at 52]. Further, he testified that defendants always told him that his laboratory values were within safe limits and that he never received hard copies of his test results. [*Id.* at 58, 60]. He stated that the first time that defendants mentioned kidney failure was after he had been hospitalized and he returned to them regarding his sinuses and asthma, by which time he was being treated by another doctor for his kidney disease. [*Id.* at 57].

The Court opines that plaintiff should have discovered his claim by January 3, 2011, when he started hemodialysis, at which time there was no question that he was diagnosed with end-stage renal failure. As of that time, plaintiff should have been aware that such diagnosis was contradictory to defendants' diagnosis. As addressed above, plaintiff testified that defendants had informed him that there was nothing to worry about in terms of his kidneys. *Solowy; supra; McGuire, supra.* Thus, plaintiff had 6 months from such date within which to file his claim, or, more specifically, he should have filed his claim by July 3, 2012 at the latest. Since he failed to do so, his claim is time-barred. Contrary to plaintiff's position, there is no continuing-wrong or continuing-treatment doctrine in this jurisdiction. *McKiney, supra.*

The Court is mindful that plaintiff submitted an affidavit stating that his treating nephrologist, Dr. Jakaku Tayeb, informed him on September 20, 2012 that he should have been referred to a nephrologist when his kidney problems began in 2008 and that if he had seen a nephrologist sooner, his kidney failure and hemodialysis could have been delayed or possibly eliminated with proper care and treatment. However, such affidavit is based on inadmissible hearsay under MRE 801 and 802. Accordingly, the Court does not regard September 20, 2012 as the date on which plaintiff first discovered his claim.

The Court is also aware that plaintiff testified that in October 2011, Dr. Tayeb raised the option of a kidney transplant. [Plaintiff's dep. at 66]. However, the Court opines that a transplant was a possible means of addressing plaintiff's end-stage kidney disease and did not constitute a diagnosis of such disease, which had previously been made in January 2011 when he was hospitalized.

Under these circumstances, defendants are entitled to summary disposition pursuant to MCR 2.116(C)(7). *Hanley, supra; Kent, supra.*

IV.

For the foregoing reasons,

Defendants' motion for summary disposition is GRANTED pursuant to MCR 2.116(C)(7).

This decision resolves the last pending issue and closes the case.

IT IS SO ORDERED.

JAMES M. BIERNAT, JR., Circuit Judge

JMB/kmv

DATED: OCT 23 2014

cc: Brian J. McKeen, Attorney at Law
John R. LaParl, Jr., Attorney at Law
Jennifer Andreou, Attorney at Law
Paul J. Dwaihy, Attorney at Law

A TRUE COPY
Carmella Sabaugh
COUNTY CLERK
BY _____ DEPUTY CLERK

EXHIBIT I

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

KERRY JENDRUSINA,

Plaintiff,

vs. Case No. 2013-3802-NH

SHYAM MISHRA, M.D.,
SHYAM N. MISHRA, M.D., P.C.,
Jointly and Severally,

Defendants.
_____/

OPINION AND ORDER

This matter is before the Court on plaintiff's motion for reconsideration of the October 23, 2014 *Opinion and Order* pursuant to MCR 2.119(F).

The instant controversy arises out of defendants' alleged negligence with respect to plaintiff's kidney disease. Plaintiff alleged that defendants failed to: order the appropriate diagnostic testing, properly educate him about his condition, and refer him to a nephrologist, among other things. In the subject decision, the Court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) on the ground that plaintiff's claims were time-barred. Plaintiff presently contends that the decision was the result of a palpable factual and/or legal error.

A motion for reconsideration under MCR 2.119(F) is not to be granted unless the motion is filed no later than 21 days after the challenged decision and the movant demonstrates a palpable error by which the Court and the parties have been misled such that a different disposition must result from the correction of the error. MCR 2.119(F)(1), (3). A "palpable"

error is an error that is "[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest." *Luckow v Luckow*, 291 Mich App 417, 426; 805 NW2d 453 (2011). The purpose of a motion for reconsideration is to allow the Court to correct a mistake it may have made in ruling on a motion which would otherwise be corrected on appeal at a greater expense to the parties. *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987). The ruling on a motion for reconsideration is a matter of discretion. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 8; 614 NW2d 169 (2000).

After careful consideration, the Court is not persuaded that plaintiff is entitled to relief under MCR 2.119(F). In this regard, the Court opines that plaintiff failed to demonstrate a palpable factual and/or legal error. The Court remains convinced that its decision was appropriate under the totality of circumstances.

For the foregoing reasons,

Plaintiff's motion for reconsideration of the October 23, 2014 *Opinion and Order* is DENIED pursuant to MCR 2.119(F).

This case remains closed.

IT IS SO ORDERED.

JAMES M. BIERNAT, JR., Circuit Judge

JMB/kmv

DATED: NOV 26 2014

cc: Brian J. McKeen, Attorney at Law
John R. LaParl, Jr., Attorney at Law
D. Jennifer Andreou, Attorney at Law
Paul J. Dwaihy, Attorney at Law

A TRUE COPY
Carol Gaugh CLERK
BY _____ DEPUTY CLERK

EXHIBIT J

Court of Appeals, State of Michigan

ORDER

Kerry Jendrusina v Shyam Mishra MD

Docket No. 325133

LC No. 2013-003802-NH

Elizabeth L. Gleicher
Presiding Judge

Kathleen Jansen

Douglas B. Shapiro
Judges

The Court orders that the motion for reconsideration is DENIED.

Presiding Judge

Jansen, J. would grant the motion for reconsideration.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

SEP 26 2016
Date

Chief Clerk

EXHIBIT K

2012 WL 2362405
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Andrew PALUDA and Catherine Paluda, Plaintiffs–Appellants,
v.
ASSOCIATES OF INTERNAL MEDICINE, P.C., and Stephen A. Williams, M.D., Defendants–Appellees.

Docket No. 303789.
|
June 21, 2012.

Oakland Circuit Court; LC No.2010–112989–NH.

Before: GLEICHER, P.J., and M.J. KELLY and BOONSTRA, JJ.

Opinion

PER CURIAM.

*1 In this medical malpractice action, plaintiffs Andrew and Catherine Paluda (collectively, the Paludas) appeal by right the trial court's opinion and order dismissing their claims against defendants Associates of Internal Medicine, P.C. (Associates) and Stephen A. Williams, M.D. as untimely. Because we conclude that—given the evidence actually presented by the parties on Williams and Associates' motion for summary disposition—the trial court properly determined that the Paludas' claims were untimely, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In November 2005, Andrew Paluda went to see Williams for a checkup. During that visit, Williams performed a Prostate Specific Antigen (PSA) test on Andrew. The test results showed that Andrew had a mildly elevated PSA, which might indicate that he had prostate cancer. Williams stated that he informed Andrew about the results and asked him to schedule a follow-up appointment. Andrew Paluda testified at his deposition that Williams did not inform him about the results and did not schedule any follow-up tests.

After the 2005 test, Andrew Paluda continued to consult with Williams. However, Williams took no further action with regard to the elevated test result. Andrew Paluda had a general health evaluation with Williams in March 2007, but Williams did not discuss the prior prostate test or schedule a new test.

In July 2008, Andrew Paluda went to see Williams with complaints that he was having difficulty urinating. Williams performed a prostate examination on Andrew and tested his prostate antigen level again. The test revealed that his antigen level was now more than ten times the normal level. Andrew was diagnosed with prostate cancer in August 2008.

The Paludas gave Williams and Associates notice of their intent to sue in May 2010 and filed their complaint in November 2010. They alleged that Williams failed to inform Andrew Paluda about the results from the November 2005 PSA test and did not take any follow up measures despite repeated contacts over the next two years. The Paludas further alleged that the failure to inform them about Andrew's test results, as well as the failure to take specific actions with regard to Andrew's prostate health during later visits and contacts breached the applicable standard of care. Finally, they alleged that Williams and Associates "fraudulently and wrongfully concealed their acts and omissions of malpractice."

In November 2010, Williams and Associates moved for summary disposition under MCR 2.116(C)(8) and (C)(10). They argued that the Paludas' claims accrued in November 2005—after the initial elevated prostate test results came back—and, therefore, they had to sue by November 2007 under the applicable period of limitations. Further, to the extent that the discovery rule might apply, they argued that the Paludas knew or should have known that they had a potential claim for malpractice once Andrew was diagnosed with prostate cancer in August 2008. As such, they had to sue under the discovery rule within six months of that date, which was January 2009. Because they did not give notice that they were going to sue until May 2010, their complaint was untimely and should be dismissed. In response to this motion, the Paludas presented evidence that Williams did not inform them about the elevated test results from 2005

and continued to conceal that information—by not revealing it or acting on it—until Andrew's diagnosis with cancer. This concealment, they maintained, amounted to fraudulent concealment that extended the applicable period of limitations to two years from the date that they knew or should have known that they had a claim for malpractice.

***2** Andrew Paluda died in January 2011.

In February 2011, the trial court issued an opinion and order on the motion for summary disposition. The trial court agreed with Williams and Associates that the normal two year period of limitations had passed. It also agreed that the Paludas knew or should have known about their claims in August or September 2008—or at best, in June 2009. As such, the six month period for discovered claims had also expired. Finally, the trial court rejected the Paludas' claims that they had sufficiently alleged fraudulent concealment:

> [T]he Complaint contains no allegation which states or reasonably infers that any Defendant engaged in an affirmative act or misrepresentation designed to prevent the discovery of the Plaintiff[s'] claim. The blanket allegation in Paragraph 19 of the Complaint that "Defendants fraudulently and wrongfully concealed their acts and omissions of malpractice" is insufficient to state a claim for fraudulent concealment because it is a mere statement of a pleader's conclusion, unsupported elsewhere by allegations of fact....
>
> Being generous, the Complaint at most alleges the failure to inform—i.e., silence. However, "[m]ere silence is not enough." ...

For these reasons, the trial court granted Williams and Associates' motion for summary disposition, denied the Paludas' motion for leave to amend their complaint to more specifically state the elements of fraudulent concealment, and dismissed their claims.

This appeal followed.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

On appeal, the Paludas argue that the trial court erred when it determined that their complaint was untimely and dismissed it on that basis. In the alternative, they argue that the trial court abused its discretion when it denied them leave to amend their complaint to more specifically state facts to support their claim that Williams and Associates fraudulently concealed their claim. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v. Gates Performance Engineering, Inc,* 285 Mich.App 362, 369; 775 NW2d 618 (2009). This Court reviews a trial court's decision on a motion for leave to amend for an abuse of discretion. *Detroit Int'l Bridge Co v. Commodities Export Co,* 279 Mich.App 662, 666; 760 NW2d 565 (2008).

B. THE PERIOD OF LIMITATIONS

As a preliminary matter, we note that the trial court granted Williams and Associates' motion under MCR 2.116(C)(8) and (C)(10). However, it determined that summary disposition was appropriate because the undisputed facts established that the Paludas' claims were untimely under the applicable period of limitations. A party should move for summary disposition under MCR 2.116(C)(7) when challenging whether the plaintiff's complaint is barred under the applicable period of limitations. See *Bryant v. Oakpointe Villa Nursing Centre, Inc,* 471 Mich. 411, 419; 684 NW2d 864 (2004). Accordingly, we will review the trial court's decision to grant summary disposition under MCR 2.116(C)(7). See *Spiek v. Dep't of Corrections,* 456 Mich. 331, 338 n 9; 572 NW2d 201 (1998). In reviewing whether the trial court properly granted a motion brought under MCR 2.116(C)(7), this Court reviews all documentary evidence and will accept the complaint as factually accurate unless contradicted by affidavits or other documents. *Shay v. Aldrich,* 487 Mich. 648, 656; 790 NW2d 629 (2010). When the parties have submitted documentary evidence, this Court will review the evidence in the light most favorable to the nonmoving party. *Dextrom v. Wexford Co,* 287 Mich.App 406, 429; 789 NW2d 211 (2010). If the facts are undisputed, whether the claim is barred is an issue of law for the court; however, if there is a question of fact, dismissal is inappropriate. *Id.*

***3** Under MCL 600.5838a(1), a medical malpractice claim "accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of

the time the plaintiff discovers or otherwise has knowledge of the claim." In their complaint, the Paludas alleged that Williams committed various discrete acts of malpractice, beginning in November 2005 and continuing to March 2007. Accepting these allegations as true, the latest date that they could have sued under MCL 600.5838a(1) was March 2009. Thus, their claims were plainly untimely. However, the Legislature has extended the period of limitations for hidden injuries.

Under MCL 600.5838a(2), a plaintiff may assert a medical malpractice claim after the two-year period has expired, provided that he or she brings the claim within six months after discovering that such a claim exists. *Solowy v. Oakwood Hosp Corp,* 454 Mich. 214, 221; 561 NW2d 843 (1997). The six-month discovery period "begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action." *Id.* at 222. This standard does not require a plaintiff to know with certainty that he or she has a claim. *Id.* Instead, the six-month limitations period begins to run once a plaintiff either becomes aware of an injury and its possible cause or when he or she objectively should have become aware of the injury and its possible cause. *Id.* at 222–223.

Here, the undisputed documentary evidence showed that Andrew Paluda was diagnosed with prostate cancer in August 2008 and was told how advanced it was by September 2008. Given the advanced stage and Andrew Paluda's knowledge concerning his prior treatments, he knew or should have realized that he had had prostate cancer for some time and, as such, he knew or should have known that Williams might have negligently failed to properly detect or diagnose his condition at an earlier stage. See *id.* at 224–225; see also *Jackson Co Hog Producers v. Consumers Power Co,* 234 Mich.App 72, 78; 592 NW2d 112 (1999) (stating that the objective facts need only demonstrate a possible causal connection between the injury and the defendant's conduct). Moreover, a plaintiff is charged with "the exercise of reasonable diligence" to discover a possible cause of action. *Moll v. Abbott Laboratories,* 444 Mich. 1, 16; 506 NW2d 816 (1993). Using reasonable diligence, the Paludas could have discovered that the failure to detect Andrew's prostate cancer at an earlier stage was, at least in part, due to Williams' negligence. As such, the Paludas had until February 2009 to sue under MCL 600.5838a(2), which they did not do.

The Paludas also alleged and argued that their claim was timely because Williams' fraudulent concealment of the facts prevented them from discovering their claim until February 2010, which was when they received a copy of Andrew's medical records. A defendant's fraudulent or wrongful concealment of a claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue extends the applicable period to 2 years from the date that the person entitled to sue discovers or should have discovered the existence of the claim. MCL 600.5838a(3); MCL 600.5855. Generally, "[f]raudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent." *Doe v. Roman Catholic Archbishop of the Archdiocese of Detroit,* 264 Mich.App 632, 642; 692 NW2d 398 (2004) (internal quotation marks and citation omitted). Accordingly, mere silence is normally not sufficient to establish fraudulent concealment. *Id.* at 642, 645–646; *Sills v. Oakland Gen Hosp,* 220 Mich.App 303, 310; 559 NW2d 348 (1996).

***4** We agree with the trial court that the Paludas did not sufficiently plead fraudulent concealment in their complaint. In addition, we conclude that, in their reply to Williams and Associates' motion for summary disposition, the Paludas relied on Williams' silence to establish fraudulent concealment; indeed, their argument is that Williams' failure to disclose the test results and to take steps to act on those test results during subsequent interactions with Andrew Paluda constituted both a breach of the standard of care and fraudulent concealment. But Williams' silence in the face of the test results and his failure to act on the test results does not amount to the employment of artifice, "planned to prevent inquiry" or to "escape investigation." *Doe,* 264 Mich.App at 642. Thus, setting aside the fact that the Paludas did not properly allege acts of fraudulent concealment, see *Sills,* 220 Mich.App at 310 (noting that a plaintiff must "plead in the complaint acts or misrepresentations that comprised fraudulent concealment"), the Paludas did not present any evidence in response to Williams and Associates' motion that would establish fraudulent concealment through affirmative acts.

We acknowledge that there is an exception to the mere silence rule; if the parties have a fiduciary relationship such that the defendant had a duty to disclose the

malpractice, the failure to disclose the malpractice can constitute fraudulent concealment. See *Brownell v. Garber,* 199 Mich.App 519, 527; 503 NW2d 81 (1993). The physician-patient relationship is a fiduciary relationship. *Melynchenko v. Clay,* 152 Mich.App 193, 197; 393 NW2d 589 (1986). Accordingly, Williams had a fiduciary duty to fully and fairly disclose any mistakes that he might have made in treating Andrew. See *Brownell,* 199 Mich.App at 527. Williams was not, however, required to reveal malpractice about which he was unaware. *Id.* at 528–529. And, in this case, the Paludas did not allege or bring forth evidence to show that Williams understood that he had made mistakes in caring for Andrew and failed to disclose those mistakes in order to prevent discovery of a malpractice claim. For these reasons, we cannot conclude that the trial court erred when it determined that MCL 600.5855 did not apply to extend the applicable period of limitations.

Finally, the Paludas argue that the trial court abused its discretion by denying their motion to amend their complaint to more clearly allege facts in support of their claim that Williams and Associates fraudulently concealed their malpractice. However, on appeal, the Paludas failed to address this issue. As such, they have abandoned it. *Blackburne & Brown Mortgage Co v. Ziomek,* 264 Mich.App 615, 619; 692 NW2d 388 (2004).

In any event, we do not agree that amendment would save their claim. Once Williams and Associates made a properly supported motion for summary disposition on the grounds that, given the evidence, the Paludas' claims were barred under the applicable period of limitations, the Paludas had the burden to respond with evidence showing that their complaint was timely as a matter of law, or at the least, that there was a question of fact as to whether their complaint was timely. See *Barnard Mfg,* 285 Mich.App at 374. As such, they had an independent duty to present evidence that established Williams' fraudulent concealment in their reply brief—notwithstanding any inadequacies in their complaint; they could not avoid dismissal by promising to "allege" new facts in an amended complaint or by presenting novel arguments and new evidence after the trial court decided the motion for summary disposition. *Maiden v. Rozwood,* 461 Mich. 109, 121; 597 NW2d 817 (1999) (stating that a "mere promise" to come forth with evidence to support a claim is insufficient to avoid summary disposition); *Barnard Mfg,* 285 Mich.App at 380–381 (explaining that this Court must review the trial court's decision on a motion for summary disposition by considering only the arguments and evidence actually raised by the parties in support or opposition to the motion). Consequently, we cannot conclude that the trial court abused its discretion when it refused to grant the Paludas leave to amend.

***5** The trial court did not err when it dismissed the Paludas' claims as untimely.

Affirmed. As the prevailing parties, Williams and Associates may tax their costs. MCR 7.219(A).

All Citations

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EXHIBIT L

2000 WL 33388547
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Kenneth ZIMNICKI, Plaintiff-Appellant,
v.
Michael ROLLINS, Defendant-Appellee.

No. 217900.
|
Dec. 26, 2000.

Before: GRIFFIN, P.J., and HOLBROOK, Jr., and MURPHY, JJ.

Opinion

PER CURIAM.

***1** In this medical malpractice action, plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and dismissing his action with prejudice on the basis that it is barred by the applicable statute of limitations. We affirm.

In reviewing a motion under MCR 2.116(C)(7), we accept a plaintiff's well-pleaded allegations as true and construe them in favor of the plaintiff. *Witherspoon v. Guilford,* 203 Mich.App 240, 243; 511 NW2d 720 (1994); *Smith v. Quality Const Co,* 200 Mich.App 297, 299; 503 NW2d 753 (1993). The motion should not be granted unless no factual development could provide a basis for recovery. *Simmons v. Apex Drug Stores,* 201 Mich.App 250, 252; 506 NW2d 562 (1993). If no facts are in dispute, the issue of whether the plaintiff's claim is statutorily barred is a question of law. *Witherspoon, supra* at 243; *Smith, supra* at 299. Furthermore, the question whether a claim was filed within the period of limitations is one of law and, therefore, our review is de novo. *Solowy v. Oakwood Hosp Corp,* 454 Mich. 214, 216; 561 NW2d 843 (1997).

Generally, a plaintiff must bring his malpractice action within two years of when the claim first accrues under M.C.L. § 600.5805(1) and (4); MSA 27A.5805(1) and (4). Medical malpractice claims accrue "at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a(1); MSA 27A .5838(1)(1). Claims for acts or omissions giving rise to a claim of malpractice which occurred after October 1, 1986, accrue on the date of the alleged act or omission giving rise to the claim. *Solowy, supra* at 220. Assuming that defendant's final act or omission occurred on the last visit on February 2, 1995, the statute would have run on February 2, 1997, more than four months before plaintiff filed his notice of intent to sue on June 12, 1997 and more than ten months before plaintiff filed his complaint.

There is also a six-month "latent" discovery rule which provides that "an action involving a claim based on medical malpractice may be commenced ... within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." MCL 600.5838a(2); MSA 27A.5838(1)(2).

In *Solowy, supra* at 222-223, our Supreme Court held that the "possible cause of action" standard announced in *Moll v. Abbott Laboratories,* 444 Mich. 1, 18; 506 NW2d 816 (1993), applies to medical malpractice claims. The Court explained that "the discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action." *Solowy, supra* at 222. "Once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action." *Moll, supra* at 23-24. The *Solowy* Court further explained that "courts should be guided by the doctrine of reasonableness and the standard of due diligence, and must consider the totality of information available to the plaintiff concerning the injury and its possible causes." *Solowy,supra* at 232.

***2** The Court set forth other rules which aid our analysis. First, the discovery rule applies to discovery of the injury, not to the discovery of the consequences of the injury which are subsequently realized. *Id.* at 223-224. Second, the standard does not require the plaintiff to know that the injury "was in fact or even likely caused by the defendant doctors' alleged omissions," nor does the standard require that the plaintiff is aware of the "full extent of [the] injury before the clock begins to run." *Id.* at 224. Finally, in considering whether objective facts exist such that the plaintiff should know that a possible cause of action exists,

a court must consider "the totality of the information available to the plaintiff, including his own observations of physical discomfort and appearance, his familiarity with the condition through past experience or otherwise, and his physician's explanations of possible causes or diagnoses of his condition." *Id.* at 227.

The question whether the statute of limitations bars plaintiff's substantive claims asks at what point in time objective facts existed such that plaintiff knew or should have known of a possible cause of action against defendant. Where, as in this case, the facts essential to such a determination are undisputed, "the question whether a plaintiff's cause of action is barred by the statute of limitations is a question of law to be determined by the trial judge ." *Moll, supra* at 26. Applying the rules clearly laid out in *Solowy* to the facts of this case, we find that the trial court correctly granted summary disposition.

Our review of the uncontested facts leads us to conclude that plaintiff should have known of a possible cause of action at the earliest on April 21, 1995 when he met with Dr. Kamath who referred him to an ear, nose and throat ("ENT") specialist Dr. Fink, or on October 23, 1995, when Dr. Fink discussed with him "what he has and what has happened" and referred him to an even more specialized ENT surgeon, Dr. Marks. Certainly, plaintiff should have known of a possible cause of action when he met with Dr. Marks on December 1, 1995, and the doctor immediately diagnosed him with cholesteatoma and recommended a CT scan, an audiogram, and either a one- or two-stage surgical procedure. Even giving plaintiff the benefit of the doubt, he should have realized that a possible cause of action existed when Dr. Marks performed the third surgery on November 4, 1996, given plaintiff's assertion that he believed that two surgeries constituted "normal" treatment for his disease. Certainly no later than November 5, 1996, when Dr. Marks discussed with plaintiff that he was going to need another exploration, plaintiff should have realized his possible cause of action.

Thus, at the very latest, pursuant to the six month discovery rule, M.C.L. § 600.5838a(2); MSA 27A.5838(1)(2), plaintiff had to commence his action by May 5, 1997. Plaintiff, however, did not file his notice of intent to sue until June 12, 1997, and did not file his complaint until Dec 11, 1997. Accordingly, plaintiff's cause of action was not brought within the limitations period, even applying the discovery rule, and his malpractice claim was time barred. [1]

***3** Finally, we reject plaintiff's argument that the trial court abused its discretion by denying his motion for leave to amend his complaint to include a claim a fraudulent concealment.

The grant or denial of leave to amend is within the trial court's discretion. *Weymers v. Khera,* 454 Mich. 639, 654; 563 NW2d 647 (1997). We will not reverse a trial court's decision regarding leave to amend unless it constituted an abuse of discretion which resulted in injustice. *Phillips v. Deilm,* 213 Mich.App 389, 393; 541 NW2d 566 (1995).

Reasons which justify denial of leave to amend include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, and futility. *Weymers, supra* at 658. An amendment would be futile if, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Hakari v. Ski Brule, Inc,* 230 Mich.App 352, 355; 584 NW2d 345 (1998). Amendments which add allegations that merely restate those already made are futile, as are amendments which add allegations that still fail to state a claim. *Lane v Kindercare Learning Centers, Inc,* 231 Mich.App 689, 697; 588 NW2d 715 (1998).

On the record before us, we concluded that the trial court did not abuse its discretion in denying plaintiff's motion to amend because the amendment to add the fraudulent concealment claim would have been futile, and would have merely restated claims already made.

In *Dunmore v. Babaoff,* 149 Mich.App 140, 145; 386 NW2d 154 (1985), this Court explained:

> Fraudulent concealment means employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent. [Citations omitted.]

Furthermore, a plaintiff seeking to toll the statute of limitations based on fraudulent concealment must prove that the defendant "committed affirmative acts

or misrepresentations that were designed to prevent subsequent discovery." *Sills v. Oakland General Hosp*, 220 Mich.App 303, 310; 559 NW2d 348 (1996). "Mere silence is insufficient." *Id.*

Although defendant should have better informed plaintiff of the nature and progression of his disease, his failure to do so alone, unaccompanied by affirmative acts or misrepresentations designed to prevent subsequent discovery, is insufficient to demonstrate a colorable claim of fraudulent concealment. Therefore, plaintiff's amendment would have been futile and the trial court did not abuse its discretion by denying his motion to amend.

Affirmed.

All Citations

Not Reported in N.W.2d, 2000 WL 33388547

Footnotes

1 To the extent that plaintiff implies that it was defendant's burden to show that plaintiff knew or should have known of the malpractice, he is wrong. As statutorily provided, the burden was on plaintiff:
The burden of proving that the plaintiff, as a result of the physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff. [MCL 600.5838a(2); MSA 27A.5838(1)(2); *Solowy, supra* at 231.]

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EXHIBIT M

2001 WL 1388352
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Anna HORTON, Personal Representative of the Estate of Annette Horton, Deceased, Plaintiff-Appellant,
v.
ST. JOHN HEALTH SYSTEM-DETROIT-MACOMB CAMPUS, d/b/a/ Detroit Riverview Hospital, Defendant-Appellee,
and
BON SECOURS HOSPITAL, George Costea, D.O., and Detroit Riverview Internal Medicine Associates, Defendants.

No. 222952.
|
Nov. 6, 2001.

Before: BANDSTRA, C.J., and DOCTOROFF and WHITE, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right the circuit court order granting summary disposition to defendant Detroit Riverview Hospital (defendant) on statute of limitations grounds, MCR 2.116(C)(7), in this medical malpractice action alleging a failure to timely diagnose decedent Annette Horton's breast cancer. We affirm.

Defendant's motion for summary disposition argued that plaintiff's claim was barred by the two-year limitations period for medical malpractice claims and was also barred under the six-month discovery rule. Plaintiff argued that her claim was timely under either limitation period, and further contended that decedent's insanity tolled the running of the statutory period. The circuit court agreed with defendant.

We review the circuit court's grant of summary disposition de novo. *Sewell v. Southfield Public Schools,* 456 Mich. 670, 674; 576 NW2d 153 (1998). In reviewing a motion brought under MCR 2.116(C)(7), a court must consider all documentary evidence filed or submitted by the parties. The contents of the complaint must be accepted as true unless specifically contradicted by affidavits or other appropriate documentation submitted by the moving party. *Id.*, citing *Patterson v. Kleiman,* 447 Mich. 429, 432, 434 n 6; 526 NW2d 879 (1994).

I

Plaintiff first argues that the circuit court erred in granting summary disposition because her claim was timely under the six-month discovery limitation period, which did not begin to run until the day she learned her condition was "terminal." We disagree.

Under the discovery rule, "an action involving a claim based on medical malpractice may be commenced ... within 6 months after the plaintiff discovers or should have discovered the existence of the claim...." M.C.L. § 600.5838a(2). In *Moll v. Abbot Laboratories,* 444 Mich. 1, 24; 506 NW2d 816 (1993), the Court adopted the "possible cause of action" standard for determining when the discovery rule period begins to run. This standard applies in medical malpractice actions. *Solowy v. Oakwood Hosp,* 454 Mich. 214, 222; 561 NW2d 843 (1997).

Under the "possible cause of action" standard, "once a claimant is aware of an injury and its possible cause, the plaintiff is aware of a possible cause of action." *Moll, supra,* at 24. Further:
Michigan jurisprudence compels not only the use of an objective standard for determining when an injury is discovered, but it also compels strict adherence to the general rule that "subsequent damages do not give rise to a new cause of action." *Larson* [*v Johns-Manville Sales Corp,* 427 Mich. 301, 315; 399 NW2d 1 (1986).] The discovery rule applies to the discovery of an injury, not to the discovery of a later realized consequence of the injury. [*Moll, supra* at 18.]

In the instant case, plaintiff alleges that from March of 1992 to January of 1995, decedent presented to defendant with right breast pain but was not diagnosed with

breast cancer. Plaintiff's decedent was first diagnosed with cancer, involving "a high grade large tumor with lymph node involvement," in April of 1995. Plaintiff's decedent underwent a radical mastectomy in June, 1995, and then chemotherapy and radiation. In early 1996, a metastic lesion was found on her left femur, requiring radiation. Decedent was informed that her condition was terminal in January, 1997. She died in March 1997.

***2** Under the possible cause of action standard, the decedent should have discovered that the progression of her cancer to an advanced stage was possibly caused by defendant's alleged failure to timely diagnose her condition. Although plaintiff frames decedent's injury as death from cancer, and argues that decedent was not informed her condition was "terminal" until shortly before decedent's death, decedent's death was a consequence of the progression of her cancer to an advanced stage. Decedent's death was the "later realized consequence," i.e., the "subsequent damage" which does "not give rise to a new cause of action." Further, decedent had knowledge that her cancer had metastasized in early 1996, more than six months before her death.

Because the six-month period expired before decedent's death, decedent did not have a viable cause of action upon her death. MCL 600.5852 provides, in pertinent part:

> If a person dies *before the period of limitations has run or within 30 days after the period of limitations has run,* an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. [Emphasis added.]

Because decedent died well after the six-month period expired, the above provision does not apply. Accordingly, we conclude that the circuit court did not err when it concluded that plaintiff's claim was time barred under the six-month discovery rule.

II

Plaintiff next argues that the circuit court erred in dismissing her claim because she presented sufficient evidence to create a factual dispute regarding whether the decedent was insane when the claim accrued, a condition which would toll the limitations period. We disagree.

The tolling provision found in M.C.L. § 600.5851 states, in pertinent part:

> (1) [I]f the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.

To prevent the one-year period from beginning to run, the condition of incapacity must be continuous. MCL 600.5851(4). The burden is on the plaintiff to show that he or she is entitled to the benefit of this statute. *Warren Consolidated Schools v. WR Grace & Co,* 205 Mich.App 580, 583; 518 NW2d 508 (1994).

Plaintiff failed to sustain this burden. MCL 600.5851(2), the tolling statute, defines insanity as:

> (2) ... a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane.

The Supreme Court has identified a number of factors which would indicate a person is mentally deranged under the above provision, including an inability to attend to personal and business affairs such that it becomes necessary to explain matters an ordinary person would understand, including simple legal procedures. *Lemmerman v. Fealk,* 449 Mich. 56, 71-73; 534 NW2d 695 (1995).

***3** Here, plaintiff asserts that the two affidavits she provided in response to defendant's motion for summary

disposition present evidence that decedent was unable to manage her personal and business affairs from the time her claim accrued until her death. In those affidavits, plaintiff and Tondalaya Horton, decedent's sister, averred:

> In the late 1980's Annette was diagnosed as Manic Depressive and has been hospitalized and medicated for this condition for a number of years. From April of 1995, when Annette was first diagnosed with cancer until her death, Annette was mentally and physically, incapable of caring for her children or otherwise looking after her affairs as a result of the treatment necessary to treat her disease, which left her fatigued, confused and disoriented, as well as her underlying mental condition.

In order to create a genuine issue of fact, a party must present evidence that would be admissible at trial. *Cox v. Dearborn Heights,* 210 Mich.App 389, 398; 534 NW2d 135 (1995). As defendant correctly points out, "opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence." *SSC v. Detroit Retirement System,* 192 Mich.App 360, 364; 480 NW2d 275 (1991).

The affidavits were unsupported by any medical records. They referred to a diagnosis made in the late 1980's. No dates were given in connection with the alleged hospitalizations for the manic depressive condition. The affidavit states in conclusory form that decedent was mentally and physically unable to care for her children and look after her affairs due to the treatment and to her underlying mental condition. However, the treatment does not date back to January or April of 1995, when the cause of action accrued; the underlying mental condition in 1995 was not established; and the inability to care for her children or her affairs is linked not only to her mental condition, but her physical condition as well. We agree with the circuit court's determination that the affidavits were insufficient to create a genuine issue of material fact.

Although plaintiff correctly points out that summary disposition is improper where evidence before the court is conflicting, *Deflaviis v. Lord & Taylor,* 223 Mich.App 432, 436; 566 NW2d 661 (1997), where no material factual dispute exists, whether plaintiff's claim is barred is a question for the court as a matter of law, *Baker v. DEC International,* 218 Mich.App 248, 253; 553 NW2d 667 (1996), rev'd in part on other grounds 458 Mich. 247; 580 NW2d 894 (1998). Here, the circuit court correctly concluded that plaintiff's affidavits were too conclusory to create a material factual dispute and that, therefore, plaintiff's claim was time barred.

III

Plaintiff also argues that the circuit court erred in concluding her claim was untimely because the accrual date which triggers the general two-year limitations period was not the date decedent last visited defendant before being diagnosed with cancer, but rather the date when the mammogram was finally requested. Again, we disagree.

***4** Generally, a plaintiff has two years from the date the claim accrues to commence a medical malpractice action. MCL 600.5805(1), (4). The Legislature has explained the accrual date as follows:

> [A] claim based on the medical malpractice of a person who is, or who holds himself or herself out to be, a licensed health care professional ... accrues at the time of the act or omission which is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. [MCL 600.5838a(1).]

Plaintiff's argument that the omission continued until the proper tests were finally requested on April 17, 1995 under a "continuing tort" theory is unsupported. This Court has declined to adopt a continuing-wrong theory in the context of a medical malpractice action. *McKiney v. Clayman,* 237 Mich.App 198, 208; 602 NW2d 612 (1999). In *McKiney,* the plaintiff alleged that the defendant "failed to properly evaluate her condition by not diagnosing her cancer and failed to properly treat her by neglecting to conduct appropriate examinations and neglecting to refer her to other, more appropriate and competent healthcare providers." *Id.* at 202. Thus, like the plaintiff's allegations

in the present case, the plaintiff in *McKiney* was suing the defendant because of a failure to act or an omission rather than for a negligent act.

Moreover, the plaintiff in *McKiney* contended that these omissions or failures continued until the physician-patient relationship was terminated. *Id.* Here, plaintiff contends that the omissions continued until the proper diagnostic testing was finally requested. Thus, in both cases, the plaintiffs argue that the omission continued to occur well beyond the last appointment where their physicians failed to diagnose their cancer.

The *McKiney* panel concluded that, because the plaintiff did not allege any new omissions beyond the defendant's failure to diagnose the cancer at the last doctor's appointment, the accrual date was the date the defendant last saw the plaintiff. *Id.* at 207. Applying the reasoning in *McKiney* to the case at bar, the date of the last omission was January 10, 1995, the date when defendant last saw plaintiff and failed to order a mammogram.

Because the circuit court correctly concluded that the accrual date was January 10, 1995, decedent's claim was barred before her death on March 6, 1997. Thus, the circuit court's conclusion that the two-year limitations period bars plaintiff's lawsuit was correct.

Affirmed.

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EXHIBIT N

1998 WL 1989875
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Anna THOMPSON, Plaintiff-Appellant,
v.
Steven DRAYER, M.D., Defendant-Appellee,
and
EDWARD W. SPARROW HOSPITAL
and Brian McCardel, M.D., Defendants.

No. 200126.
|
Sept. 25, 1998.

Before: HOOD, P.J., and GRIFFIN and O'CONNELL, JJ.

Opinion

PER CURIAM.

*1 Plaintiff appeals as of right from the trial court's order dismissing her medical malpractice action on the ground that plaintiff failed to bring action within the applicable period of limitations. MCR 2.116(C)(7). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff argues that the trial court erroneously determined that she failed to commence her cause of action within six months of the discovery of her claim against Dr. Drayer. We disagree. Generally a party alleging medical malpractice must commence action within two years of when the claim accrued, or within six months of when the claim was, or should have been, discovered. *Solowy v. Oakwood Hospital Corp,* 454 Mich. 214, 219; 561 NW2d 843 (1997), citing M.C.L. § 600.5805(4); MSA 27A.5805(4); MCL 600.5838; MSA 27A.5838. A medical malpractice claim accrues "at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim ." M.C.L. § 600.5838a(1); MSA 27A.5838(1)(1). The six-month discovery rule provides that a medical malpractice claim initiated outside the normal period of limitations may nonetheless proceed if commenced "within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." MCL 600 .5838a(2); MSA 27A.5838(1)(2). A party alleging medical malpractice is deemed to be aware of the possible cause of action when, upon an objective assessment of the facts, the party has become aware of the injury and its possible cause. *Solowy, supra* at 222-223; *Shawl v. Dhital,* 209 Mich.App 321, 325; 529 NW2d 661 (1995).

Accepting plaintiff's well-pleaded allegations as true, and considering the documentation that Drayer submitted, *Shawl, supra* at 323-324, we conclude that plaintiff should have discovered her possible cause of action against Drayer no later than May 28, 1993. Plaintiff was aware of her injury as of her post-operative office visit with Drayer on May 26, 1993, at which time plaintiff's arm was nearly rigid and Drayer expressed concern about the arm and that his instructions had not been followed. By May 28, 1993, plaintiff further understood that Drayer performed the surgery, that Drayer prepared written instructions concerning her post-operative care but failed personally to take any action to ensure that defendant received these instructions, that Drayer delegated the duty of providing post-operative instructions to Dr. McCardel and hospital personnel, and that plaintiff in fact received erroneous instructions that caused her arm to heal improperly. In light of these facts, plaintiff should have been aware of the possible causal connection between her injury and Drayer's failure personally to deliver, or otherwise ensure that plaintiff would receive, his instructions for her post-operative care. Accordingly, as of May 28, 1993, plaintiff was aware of both her injury and the possible causal connection between that injury Drayer's acts or omissions. Because Plaintiff waited more than six months after this date to file suit, the trial court properly found her claim time barred.

*2 Assuming, without deciding, that that the trial court erroneously refused to consider plaintiff's affidavit, the error was harmless. Plaintiff's actual knowledge is irrelevant to a determination of when the discovery period commenced in this case. *Solowy, supra* at 222. Instead, the dispositive question is when plaintiff should have known of a possible cause of action against Drayer. *Id.; Shawl, supra* at 325. The facts as alleged in plaintiff's complaint indicate that plaintiff should have known of the existence of a possible cause of action as of May 28, 1993. Because

plaintiff commenced action only on November 16, 1996, the action was time barred.

Affirmed.

All Citations

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